Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

SOUTHERN OREGON BARTER FAIR,

Petitioner,

v.

STATE OF OREGON,

Intervenor-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did this Court intend by its decision in *Thomas v. Chicago Park Dist.*, 122 S. Ct. 775, 534 U.S. 316, 151 L. Ed. 2d 783 (2002), to eliminate the requirement for a timely administrative review of Application for Permit, when the licensing scheme is content neutral?

PARTIES TO PROCEEDING

Petitioner is Southern Oregon Barter Fair, Inc.

Respondent is the State of Oregon.

In addition to these parties, the following were parties to the proceedings below:

JACKSON COUNTY,
JACKSON COUNTY COMMISSIONERS,
JACKSON COUNTY SHERIFF,

and as individuals:

RIC HOLT,
JACK WALKER,
SUE KUPILLAS,
and ROBERT KENNEDY.

RULE 29.6 STATEMENT

Southern Oregon Barter Fair is a 501(c)(3), nonprofit corporation, organized and existing under the laws of the State of Oregon. The corporation's primary purpose and activity is to organize and host an annual public gathering and festival dedicated to the cultural and religious integrity of natural peoples everywhere. The principle office is located at 1130 Tetherow Road, Williams, OR 97544.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO PROCEEDING	ii
RULE 29.6 STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	v
TABLE OF APPENDICES	vii
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
RELEVANT STATUTORY AND CONSTITUTIONAL PROVISION INVOLVED	1
STATEMENT OF THE CASE	2
A. THE ANNUAL SOUTHERN OREGON BARTER FAIR AND JACKSON COUNTY	2
B. PROCEEDINGS BELOW	3

Contents

	Page
REASONS FOR GRANTING THE PETITION . . .	4
1. CONFLICT WITH THIS COURT'S HOLDING IN *THOMAS*	4
2. CONFLICT WITH OTHER CIRCUITS	8
CONCLUSION	12

TABLE OF CITED AUTHORITIES

CASES *Page*

American Civil Liberties Union of Nevada v. City of Las Vegas, 333 F.3d 1092 (9th Cir. 2003) 8

City of Littleton, Colo. v. Z.J. Gifts D-4, L.L.C., 124 S. Ct. 2219 (2004) 7-8

Freedman v. Maryland, 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649 (1965) 8

Lombardo v. Warner, 353 F.3d 774 (9th Cir. 2003) ... 9

New England Reg. Council of Carpenters v. Kinton, 284 F.3d 9 (1st Cir. 2002) 6

Southern Oregon Barter Fair v. Jackson County, Oregon, 401 F.3d 1124 (2005) 2

Southern Oregon Barter Fair v. Jackson County, Oregon, 372 F.3d 1128 (C.A.9 (Or.)) 5

THG Enterprises Inc. v. City of El Cajon, 60 Fed.Appx. 711 (9th Cir. 2003) 9

Thomas v. Chicago Park Dist, 122 S. Ct. 775, 534 U.S. 316, 151 L. Ed. 2d 783 (2002) .....*passim*

Cited Authorities

Page

UNITED STATES CONSTITUTION

First Amendment 1, 4

STATUTES

28 U.S.C. § 1254(1) 1

Oregon Mass Gathering Act 1

ORS 433.735 to 433.770 1

ORS 433.990(6) 1

Chicago Ordinance 6

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Ninth Circuit Filed June 24, 2004 ..... 1a

Appendix B — Order Of The United States District Court For The District Of Oregon Dated April, 2002 ..... 25a

Appendix C — Order Of The United States Court Of Appeals For The Ninth Circuit Denying Petition For Panel Rehearing En Banc Filed July 21, 2004; Published Dissenting Opinion Of The United States Court Of Appeals For The Ninth Circuit Filed March 24, 2005 ..... 64a

Appendix D — Oregon Mass Gathering Act 76a

Petitioner Southern Oregon Barter Fair, Inc. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, En banc. The Circuit Court's opinion misinterprets the plain language and meaning of this Court's opinion in *Thomas v. Chicago Park Dist*, 122 S. Ct. 775, 534 U.S. 316, 151 L. Ed. 2d 783 (2002), by eliminating the requirement for timely administration review of application for permit.

OPINIONS BELOW

March 24, 2005 the United State Court of Appeals for the Ninth Circuit denied Petition for rehearing en banc, with a published Dissenting opinion at 401 F.3d 1124 (C.A. 9, 2005). (Pet. App. C.) June 24, 2004, a three-judge panel of the United State Court of Appeals for the Ninth Circuit issued a published opinion, at 372 F.3d 1128 (C.A. 9 (Or.), 2004). (Pet. App. A.)

STATEMENT OF JURISDICTION

Certiorari jurisdiction of this court is invoked in conformity with 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISION INVOLVED

The Oregon Mass Gathering Act, ORS 433.735 to 433.770 and 433.990(6). (Pet. App. D.)

The First Amendment to the United States Constitution.

STATEMENT OF THE CASE

A. THE ANNUAL SOUTHERN OREGON BARTER FAIR AND JACKSON COUNTY

For twelve years preceding the 1996 event, the Southern Oregon Barter Fair was an annual three-day event held on the same private property attracting several thousand participants. In large part due to the difference in social/ cultural life styles, Jackson County, the governing body where the event was held, and the Barter Fair exercised many years of contentious interaction. In 1994, a 'Barter Fair Ordinance' was passed designed to impose limitations and restrictions on the event's procedures. In 1996, the County decided to use the permit system detailed in the Oregon State Mass Gathering Act.

Taken from the Ninth Circuit's En Banc Dissent, *Southern Oregon Barter Fair v. Jackson County, Oregon*, 401 F.3d 1124, 1126-27 (2005), the history of the permit process for 1996 under the Oregon State Mass Gathering Act illustrates the problem with the Ninth Circuit's Opinion, and interpretation of *Thomas*, allowing no deadline for a licensing body to consider an Application for Permit:

> The Fair first requested an application in January 1996. The defendants did not immediately provide an application, explaining that they were in the process of drafting a new ordinance that would require a new application. In April 1996, defendants gave the Fair an application that was identical to the one they had provided the year before. Plaintiff immediately submitted an application, but the defendants did not schedule a hearing on the application until July 22, 1996,

> more than three months after the Fair submitted the permit and more than five months after the Fair had first applied for a permit application. At the July 22 hearing, one defendant-commissioner, expressing his personal disapproval of the lifestyle, beliefs, and practices of the people who would attend the proposed Fair, argued that the Fair's proposed event had no merit and should not be allowed to proceed. Defendants ultimately reached no decision on the application at that hearing, and rescheduled the hearing for more than one month later on August 27, 1996. Finally, more than eight months after the Fair first requested an application, defendants approved the Fair's application on August 29, 1996.

The application was for an event to be held the first weekend in October.

B. PROCEEDINGS BELOW

The 'approval' of the Permit contained so many onerous conditions and restrictions that a federal magistrate issued a Temporary Restraining Order and Preliminary Injunction against enforcement of the Oregon Mass Gathering Act and the Permit. The event went forward and a civil rights action was filed based upon the treatment by Jackson County toward the Barter Fair. After initially declining to intervene, the State of Oregon intervened to defend its statute at Summary Judgment proceedings. The Court, citing *Thomas v. Chicago Park Dist*, 122 S. Ct. 775, 534 U.S. 316, 151 L. Ed. 2d 783 (2002), reversed its earlier Preliminary Injunction and denied the Permanent Injunction against the Mass Gathering Act. The civil rights action proceeded to trial, at which Petitioner prevailed against Jackson County and the Jackson County Sheriff.

After Summary Judgment, but before trial, the action was bifurcated and the portion of the Court's Order upholding the Statute was reduced to Judgment and proceeded to Appeal. The Ninth Circuit considered only the facial challenge to the Oregon Mass Gathering Act.

REASONS FOR GRANTING THE PETITION

1. CONFLICT WITH THIS COURT'S HOLDING IN *THOMAS*

The first and foremost reason why this Writ deserves to be Granted is to prevent any further misunderstanding and misconstruction of this Court's ruling in *Thomas v. Chicago Park Dist*, 122 S. Ct. 775, 534 U.S. 316, 151 L. Ed. 2d 783 (2002). This Court did not say in *Thomas* that a content-neutral time, place, and manner regulation need not include a deadline for administrative review. Indeed, the ordinance in *Thomas* had a twenty-eight day deadline. Yet a majority of the Ninth Circuit's En Banc panel concurred with the three judge panel's conclusion: "The Act need not include either a deadline for consideration by the governing body or a provision for prompt judicial review. *See Thomas*, 534 U.S. at 322-23, 122 S. Ct. 775." 372 F.3d at 1138.

Misapprehension of this core First Amendment protection is anathema, and must be corrected. It is important to note, in this case alone: (a) the trial court (reversing its earlier holding), (b) the three-judge appellate panel, and (c) all but seven of the en banc Court have misconstrued this Court's ruling.

The panel's ruling, *Southern Oregon Barter Fair v. Jackson County, Oregon*, 372 F.3d 1128, (C.A. 9 (Or.)), in relevant part holds:

> Because it is content-neutral, the Act need not contain the procedural safeguards required of content-based regulations. The Act need not include either a deadline for consideration by the governing body or a provision for prompt judicial review. *See Thomas*, 534 U.S. at 322-23.
>
> * * *
>
> We acknowledge the theoretical possibility that, without a deadline, Jackson County could effectively shut down gatherings by delaying permit decisions indefinitely. *See Grossman v. City of Portland*, 33 F.3d 1200, 1206 (9th Cir. 1994); *Bo Fancy Prods., Inc. v. Rabun County Bd. of Comm'rs*, 267 Ga. 341, 478 S.E.2d 373, 375-77 (Ga. 1996). The uncertainty of knowing when, if ever, the local governing body will act on the permit application may hamstring the arrangements for such large events, which must be made far in advance. In fact, in this case, the uncertainty inherent in the 1996 application process was one of the Fair's primary reasons for bringing suit.
>
> In discussing why the content-neutral ordinance in *Thomas* adequately limited the discretion of the decision-maker, the Court observed that the ordinance required the municipality to process applications within 28 days. 534 U.S. at 324.

> But the Court did not indicate that the deadline was an essential component of a reasonable time, place, and manner regulation. *To read the opinion that way would flatly contradict the decision's clear holding that time, place, and manner regulations need not contain the Freedman safeguards. Thomas, 534 U.S. at 322-23. Despite the Court's reference to the 28-day deadline, therefore, we conclude that the procedural safeguards doctrine is relevant only to explicit censorship schemes, not to content-neutral schemes.* (at 1138. Emphasis added.)

The panel's analysis functionally provides greater protection for statutes permitting one kind of speech and not others. A licensing authority must act within a reasonable time if operating under a permit system for adult bookstores or erotic parlors, but may languish indefinitely if operating under a generalized system of permitting gatherings of political expression. Such an interpretation would seem implausible, as it allows a content-based form of discretion for political expression but not for sexual expression. Petitioner concurs with the First Circuit, *New England Reg. Council of Carpenters v. Kinton*, 284 F.3d 9, 25 (n.8) (1st Cir. 2002) — the licensing authority's ability to deny a permit by dragging their feet is still repugnant and unconstitutional in light of *Thomas*.

Moreover, this Court in *Thomas*, emphasized the 28 day requirement to process an application as being a necessary component in finding the *Chicago Ordinance* sufficiently constitutional:

> Moreover, the Park District must process applications within 28 days, § C.5.c, and must

> clearly explain its reasons for any denial, § C.5.e. These grounds are reasonably specific and objective, and do not leave the decision "to the whim of the administrator." *Forsyth County*, 505 U.S., at 133, 112 S. Ct. 2395. They provide "'narrowly drawn, reasonable and definite standards'" to guide the licensor's determination, ibid. (quoting *Niemotko*, *supra*, at 271, 71 S. Ct. 325). And they are enforceable on review—first by appeal to the General Superintendent of the Park District, see Chicago Park Dist. Code, ch. VII, § C.6.a, and then by writ of common-law certiorari in the Illinois courts * * * .(at 325)

It is noteworthy that in this case before the panel, Barter Fair first attempted to apply for a Permit in January, for a large three-day event in October, and was first delayed until April 1, and then not ruled upon until late August. This delay caused the very logistical problems cited by the Panel—delay in preparation of fields, confirmation with vendors, and uncertainty of attendees.

Petitioner agrees with the perception of the Ninth Circuit En Banc's Dissent writer, indicating at the core of the problem is the three judge panel's confusion between the requirement for prompt judicial review and for prompt administrative review. It is axiomatic that a licensing agency can effectively deny an application at random by simply delaying a determination. Such unbridled discretion can only lead to the suppression of speech based upon a disagreement with that speech.

There has been a recent United States Supreme Court decision directly pointing to a result different from that achieved by the panel—*City of Littleton, Colo. v. Z.J. Gifts*

D-4, L.L.C., 124 S. Ct. 2219 (2004). The Tenth Circuit Court's analysis of a permitting process which allowed extensive indeterminate delays was cured prior to The Supreme Court receiving the case. "[The Tenth Circuit] also held unconstitutional another ordinance provision (not now before us) on the ground that it threatened lengthy administrative delay—a problem that the city believes it has cured by amending the ordinance." (at 2222.) The Court did go forward and restate the importance of the safeguard of prompt administrative review: "The core policy underlying *Freedman* is that the license for a First Amendment-protected business must be issued within a reasonable period of time, because undue delay results in the unconstitutional suppression of protected speech. Thus, the first two [Freedman] safeguards are essential. . . ." (at 2224.) Although the business at issue was specifically addressed by the statute being analyzed—an adult book store—the Court was stating what it presumed all courts know about the importance of prompt administrative action, in contrast to prompt judicial review. ("We presume that courts are aware of the constitutional need to avoid undue delay result[ing] in the unconstitutional suppression of protected speech.") (At 2225. Internal quotation omitted.)

2. CONFLICT WITH OTHER CIRCUITS

The decision of the Panel appears to conflict with other interpretations of the *Thomas* decision within the Ninth Circuit:

> *American Civil Liberties Union of Nevada v. City of Las Vegas*, 333 F.3d 1092,1108 (9th Cir. 2003) (Although the highly exacting standards of *Freedman v. Maryland*, 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649 (1965), are not required for a

> content-neutral permit scheme like the present one, limits on the discretion of the licensor are necessary to prevent viewpoint or content discrimination. *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 322-23, 122 S. Ct. 775, 151 L. Ed. 2d 783 (2002). Such limits must provide "'narrowly drawn, reasonable and definite standards'" that are "reasonably specific and objective, and do not leave the decision 'to the whim of the administrator.'" *Id.* at 781.");

THG Enterprises Inc. v. City of El Cajon, 60 Fed. Appx. 711,712 (9th Cir, 2003).

> We also affirm the district court's decision that the City's Municipal Code § 17.66.020(F)(5) is an unconstitutional prior restraint on speech. Even if we assume the ordinance is content neutral, it does not provide adequate procedural safeguards governing when, where, or how a permit is granted. *See Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323, 122 S. Ct. 775, 151 L. Ed. 2d 783 (2002).

Lombardo v. Warner, 353 F.3d 774,787 (9th Cir. 2003) (*See also Thomas*, 534 U.S. at 323, 122 S. Ct. 775. ("[E]ven content-neutral time, place, and manner restrictions can be applied in such a manner as to stifle free expression. . . . We have thus required that a time, place, and manner regulation contain adequate standards to guide the official's decision and render it subject to effective judicial review."). Absent objective, judicially-enforceable standards, it will never be possible to ensure that content or viewpoint was not taken into account * * *.")

Petitioner herein adopts the En Banc's dissenting opinion, 1128-29, on the subject of other Circuits:

> In this instance, some of the cases in the other circuits that consider seemingly similar questions rely on considerations not here applicable. To the extent others of those cases, like the panel in this case, read Thomas as having held that there is no longer any need for clear timeliness standards for the consideration of content-neutral permits affecting speech activities, those cases are wrong, and we should not follow them.
>
> The First Circuit's decision in *New England Regional Council of Carpenters v. Kinton*, 284 F.3d 9 (1st Cir. 2002), for example, involves circumstances sufficiently different from those in this case that there would be no conflict were we to hold the OMGA facially invalid for failure to specify any time limit for consideration of permit applications. In *New England Regional Council*, the First Circuit considered a leafletting permit scheme under which "the automatic issuance of permits negate[d] [the] potential concern . . . that officials could effectively deny permits by dragging their feet." *Id.* at 25 n.8. More importantly, the plaintiff's as-applied challenge did not specifically attack the lack of an administrative review deadline.
>
> The Tenth Circuit, in *Utah Animal Rights Coalition v. Salt Lake City Corp.*, 371 F.3d 1248 (10th Cir. 2004), erred as the panel did—by reading Thomas as holding that permitting

ordinances need not contain time limits when in fact *Thomas* did not so state. *See id.* at 1259. In the course of so ruling, Utah Animal Rights Coalition suggested that there is no need for time limits in content-neutral permitting ordinances, as they do not restrain speech during the period of any delay. This analysis entirely misses the reason given in Thomas for requiring "[n]arrowly drawn, reasonable and definite standards," *id.* at 324, 122 S. Ct. 775—to constrain administrative discretion that can serve as a cover for content-based distinctions and result in preventing speech for lack of adequate advance notice. Moreover, the analysis turned in part on the plaintiff's failure in that case to argue that the lack of a deadline for administrative review violated *Thomas*'s second holding. *Id.* at 1260. The plaintiff apparently argued that an administrative review deadline was required under only *Freedman v. Maryland*, not *Thomas*, as it suffered from "confusion on this point of law." *Id.* at 1259. Finally, as in *Granite State Outdoor Advertising, Inc. v. City of St. Petersburg*, 348 F.3d 1278 (11th Cir. 2003), *cert. denied*, __ U.S. __, 124 S. Ct. 2816, 159 L. Ed. 2d 247 (2004), and *Griffin v. Secretary of Veterans Affairs*, 288 F.3d 1309 (Fed. Cir. 2002), *Utah Animal Rights Coalition* disregarded *Thomas*'s review of the Chicago Park District permitting ordinance, failing to note that there was an administrative review deadline and that the Court considered that deadline in concluding that

the standards in the permitting ordinance were sufficiently specific to survive a facial challenge. [FN4]

FN4. Granite State Outdoor Advertising is particularly worrisome, as the court explicitly decided to await evidence of a pattern of abuse before deciding that the challenged ordinance without a time limit for administrative review was constitutionally inadequate. 348 F.3d at 1282.

CONCLUSION

The Ninth Circuit panel incorrectly interpreted the holding in *Thomas* as it relates to the need for prompt administrative review. The panel failed to distinguish between this court's analysis of prompt judicial review and prompt administrative review. The likelihood of other such misconstruction is high. Whether or not there is emerging an identifiable conflict among the circuits, this Court need grant this writ to prevent further misapprehension of this Court's salient and binding Ruling.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED JUNE 24, 2004

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 02-35560.

Argued and Submitted Nov. 5, 2003.

Filed June 24, 2004.

SOUTHERN OREGON BARTER FAIR,

Plaintiff-Appellant,

v.

JACKSON COUNTY, OREGON; Jackson County Board of Commissioners; Jackson County Sheriff's Department; Ric Holt; Jack Walker; Sue Kupillas; Robert Kennedy,

Defendants,

and

State of Oregon,

Defendant-Intervenor-Appellee.

Appeal from the United States District Court for the District of Oregon; John P. Cooney, Magistrate Judge, Presiding. D.C. No. CV-96-03067-CO.

Appendix A

Before: ALARCON, RAWLINSON, and BYBEE, Circuit Judges.

OPINION

BYBEE, Circuit Judge:

The Southern Oregon Barter Fair is a nonprofit corporation that held an annual fair in Oregon between 1978 and 1996. The Fair describes its event as a religious gathering, a "harvest celebration and gathering of . . . 'new age,' 'back-to-the-land' hippies and friends," and a "counterculture crafts fair" where artisans and vendors set up booths for people to buy crafts. In order to hold several previous events, most recently the 1996 event, the Fair had to obtain a permit from Jackson County, Oregon, under the Oregon Mass Gathering Act, Or. Rev. Stat. §§ 433.735-.770, 433.990(6) (2001). This appeal presents the question whether, as the Fair contends, the Act is facially unconstitutional under the First Amendment.

Oregon's Mass Gathering Act is similar to mass gathering statutes found in various other states. The Oregon Legislative Assembly passed the Act in 1971, finding "that the uncontrolled outdoor gatherings of large groups of persons for extended periods of time have necessitated a need for the establishment of reasonable health and safety rules to regulate such outdoor mass gatherings." *Id.* § 433.740. The Act regulates any "outdoor mass gathering," defined as a gathering of more than 3,000 persons in an open space for

more than 24 hours but fewer than 120 hours.[1] The Act prohibits such gatherings "on real property the organizer[2] owns, leases or possesses" unless the county governing body for the location where the gathering is planned (here, the Jackson County Board of Commissioners) has issued a permit. *Id.* § 433.745(2).[3]

The organizer must submit to the governing body a permit application containing the applicant's name and

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1. The full definition is:

> "Outdoor mass gathering," unless otherwise defined by county ordinance, means an actual or reasonably anticipated assembly of more than 3,000 persons which continues or can reasonably be expected to continue for more than 24 consecutive hours but less than 120 hours within any three-month period and which is held primarily in open spaces and not in any permanent structure.

Or. Rev. Stat. § 433.735(1).

2. "Organizer" is defined to include "any person who holds, stages or sponsors an outdoor mass gathering and the owner, lessee or possessor of the real property upon which the outdoor mass gathering is to take place." Or. Rev. Stat. § 433.735(2).

3. In full, "No organizer shall hold, conduct, advertise or otherwise promote an outdoor mass gathering or allow an outdoor mass gathering to be held on real property the organizer owns, leases or possesses unless a permit to hold such outdoor mass gathering has been issued by the county governing body in which the outdoor mass gathering is to take place." Or. Rev. Stat. § 433.745(1).

address, a legal description of the place, the date, the estimated attendance, and the nature of the proposed gathering, as well as "[s]uch other appropriate information as the county governing body may require in order to insure compliance with rules of the Department of Human Services." *Id.* § 433.750(1). The governing body "shall issue a permit . . . when the organizer demonstrates compliance with or the ability to comply with the health and safety rules governing outdoor mass gatherings to be regulated according to the anticipated crowd and adopted by the Department of Human Services." *Id.* § 433.750(1).[4] The Act authorizes the Department of Human Services to promulgate rules with respect to various health and safety issues at mass gatherings, including adequate water supply, drainage and sewage facilities, toilet facilities, refuse storage and disposal facilities, food, sanitary food service, emergency medical facilities, fire protection, security personnel and traffic control. *Id.* § 433.760. The Health Division of the Oregon Department of Human Services has accordingly promulgated regulations prescribing detailed requirements for each of the above specific health and safety issues. Or. Admin. R. 333-039-0005 to 333-039-0055.

The Act contemplates input from local law enforcement and health and safety officials in the application process. It requires the county governing body to send notice of an application to the county sheriff, the county health officer, and the chief of the relevant fire district. OR. REV. STAT. § 433.750(2). The county governing body must also hold a

4. Gatherings of more than 120 hours are subject to additional requirements geared to ensure compatibility with existing land uses. Or. Rev. Stat. § 433.763.

public hearing on the proposed gathering's compliance with the Act, and must publish notice of the hearing in specified places at least 10 days before the hearing. *Id.* § 433.750(4). Each county officer (police, health, and fire) who has received notice of the application may submit written comments and recommendations to the county governing body no later than the date of the hearing. *Id.* § 433.750(3). Furthermore, in reviewing an application, the county governing body "may require such plans, specifications and reports as it may deem necessary for proper review and it may request and shall receive from all public officers, departments and agencies of the state and its political subdivisions such cooperation and assistance as it may deem necessary." *Id.* § 433.755(1).

Additionally, the Act allows the county to charge an application fee and require the applicant to obtain insurance in appropriate circumstances. Specifically, the Act provides that a county governing body "may charge permit applicants a fee reasonably calculated to reimburse the county for its reasonable and necessary costs in receiving, processing and reviewing applications for permits to hold outdoor mass gatherings." *Id.* § 433.750(6). The Act limits the amount of the fee as follows: "a fee authorized by this subsection shall not exceed $5,000 and shall not be charged when the governing body finds, by a preponderance of the evidence presented to the governing body, that the applicant is unable to reimburse the governing body." *Id.*[5] As for insurance, the

5. The Oregon Court of Appeals has held that § 433.750(6) simply authorizes a county governing body to charge a fee for the services described in that statute; it does not preclude the governing body from charging, as authorized by local ordinance or regulation, other fees for services provided to a mass gathering. *Fence v. Jackson County,* 135 Or.App. 574, 900 P.2d 524, 527 (1995).

county governing body may, if it determines that the proposed gathering "creates a potential for injury to persons or property, . . . require organizers to obtain an insurance policy in an amount commensurate with the risk, but not exceeding $1 million." *Id.* § 433.755(1). The policy "shall provide coverage against liability for death, injury or disability of any human or for damage to property arising out of the outdoor mass gathering" and shall name the county as an additional insured. *Id.*

Finally, "[a]ny decision of a county governing body on an application for a permit to hold an outdoor mass gathering may be appealed to a circuit court for the county" under procedures specified elsewhere. *Id.* § 433.750(5).

In accordance with the Act, the Fair applied to the Jackson County Board of Commissioners for, and received, permits for its 1994 and 1995 events. The 1996 application process, however, was tumultuous. The Fair applied for a permit, but received one only after a delay of several months; and even then, the permit contained numerous conditions that the Fair considered unreasonable, including a required security deposit of nearly $18,000 (consisting of over $3,600 for administrative expenses in relation to the application, over $11,700 for the cost to the county sheriff of providing neighborhood security, and other county expenses).

Accordingly, before the 1996 event took place, the Fair brought suit in federal district court in Oregon against Jackson County, the Jackson County Board of Commissioners, and the Jackson County Sheriff. Among other things, the complaint alleged that the Act on its face violated the First Amendment, and sought injunctive and

declaratory relief against enforcement of the Act. The district court[6] granted a preliminary injunction against some of the permit conditions, including the fee.

The State of Oregon intervened and moved for summary judgment on the claims challenging the facial constitutionality of the Act. In a careful opinion, the district court granted the state's motion and dismissed the Fair's facial challenge, holding that the Act is a proper content-neutral time, place, and manner regulation. The court certified the relevant claims for appeal under FED. R. CIV. P. 54(b). Thus, only the facial challenge is before us. We are not concerned here with the Fair's remaining claims, which included as-applied challenges to the county commissioners' and sheriff's allegedly discriminatory enforcement of the Act against the Fair.[7]

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6. The parties consented to a magistrate judge's conduct of all proceedings in the case. 28 U.S.C. § 636(c)(1); Fed. R. Civ. P. 73(a), (b). The parties further consented that any appeal from a final judgment by the magistrate judge would proceed directly to this court. 28 U.S.C. § 636(c)(3); Fed. R. Civ. P. 73(c).

7. Specifically, the Fair asserted, under 42 U.S.C. § 1983, that the county commissioners and the sheriff violated the First Amendment by requiring unlawful sums of money from the Fair, failing to act on the permit application in a timely fashion, denying the Fair adequate time for judicial review of the decision on the application, subjecting the permit to unlawful conditions, and attacking the event with a disproportionate and unnecessary number of law enforcement officers. Again, those claims remained before the district court and are not before us. According to counsel for the state at oral argument, the claims were tried to a jury, the jury gave a verdict for the Fair, and the claims were subsequently settled.

Appendix A

I

At the outset, we must determine whether the case is moot. The state argued to the district court that the Fair has not applied for a mass gathering permit, or engaged in any other preparations for a mass gathering, since 1996, and that the case was therefore moot. The district court rejected this contention, but the state raises it again on appeal.[8] Mootness is a question of law reviewed de novo. *See Oregon Advocacy Ctr. v. Mink,* 322 F.3d 1101, 1116 (9th Cir.2003).

To avoid mootness, the court must determine that the issues in a case remain live and that the parties continue to have a legally cognizable interest in the outcome throughout the proceeding. *City of Erie v. Pap's A.M.,* 529 U.S. 277, 287, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000); *Doe v. Madison School Dist. No. 321,* 177 F.3d 789, 797-98 (9th Cir.1999); *see also Arizonans for Official English v. Arizona,* 520 U.S. 43, 48, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997). "The underlying concern is that, when the challenged conduct ceases such that there is no reasonable expectation that the

8. The Fair contends in its reply brief that the state may not raise either mootness or the appropriateness of the facial challenge (an issue discussed below) without having filed a cross-appeal. That is incorrect. A prevailing party need not cross-appeal to defend a judgment on any ground properly raised below, as long as it seeks to preserve rather than to change the judgment. *Rivero v. City & County of San Francisco,* 316 F.3d 857, 862 (9th Cir.2002). Additionally, as to the mootness issue, mootness goes to the court's power to hear the case, and therefore may be raised at any time by the parties, or even sua sponte by the court under its independent obligation to ensure that it has authority under Article III. *See, e.g., Dittman v. California,* 191 F.3d 1020, 1025 (9th Cir.1999).

wrong will be repeated, then it becomes impossible for the court to grant any effectual relief whatever to the prevailing party." *City of Erie,* 529 U.S. at 287, 120 S.Ct. 1382 (citations, internal quotation marks, and alterations omitted). The party asserting mootness bears the burden of establishing that there is no effective relief remaining that the court could provide. *Oregon Advocacy Ctr.,* 322 F.3d at 1116-17.

This proceeding would be moot if the Fair had entirely ceased to operate, left the business, and no longer sought or intended to seek a license. *City News & Novelty, Inc. v. City of Waukesha,* 531 U.S. 278, 283, 121 S.Ct. 743, 148 L.Ed.2d 757 (2001). In *City News,* the Court dismissed the case as moot because it was undisputed that the adult-oriented shop at issue "ha[d] ceased to operate as an adult business and no longer [sought] to renew its license"; the shop neither pursued nor "currently expresse[d] an intent to pursue a license." *Id.*

We conclude that the Fair, unlike the business in *City News,* has a sufficient ongoing interest in the outcome of the case to preclude mootness. There is no contention that the Fair has ceased to exist as a corporate entity, or that it no longer seeks to hold another gathering. The state rescinded the Fair's corporate status in 1998, apparently because the Fair failed to pay an administrative fee, but the Fair successfully requested reinstatement. The Fair has not actually held a major event since 1996, because it lacks funding and an appropriate site. However, it held a smaller event in 1997 in an attempt to raise funds, and since then has continued to seek a site for a full-sized event through discussions with the County and with private landowners. So far as the record reflects, these discussions have not yet yielded an appropriate site.

The state contends that the possibility that the Fair will actually obtain funding and a site is speculative. On this record, however, we cannot conclude that the barriers to the Fair's staging another event are "insurmountable" and therefore enough to moot the case. *Clark v. City of Lakewood,* 259 F.3d 996, 1012 (9th Cir.2001). Here, as in *Clark,* the Fair's "stated intention to return to business if the[statute] is declared unconstitutional," together with the ongoing efforts the Fair has made to arrange another gathering, sufficiently distinguish it from the plaintiff in *City News. Clark,* 259 F.3d at 1011-12 & n. 9. We cannot say that there is no reasonable expectation that the state will enforce the Act against the Fair again. We therefore proceed to review the district court's grant of summary judgment, a decision we review de novo. *San Jose Christian College v. City of Morgan Hill,* 360 F.3d 1024, 1029 (9th Cir.2004).

II

We conclude, contrary to the State's suggestion, that the Fair may bring a facial challenge to the Act. Whether the Act is subject to facial attack is a question of law reviewed de novo. *See Roulette v. City of Seattle,* 97 F.3d 300, 302 (9th Cir.1996). Courts generally disfavor facial challenges to legislation, although this reluctance is somewhat relaxed in the First Amendment context. *See, e.g., Nat'l Endowment for the Arts v. Finley,* 524 U.S. 569, 580, 118 S.Ct. 2168, 141 L.Ed.2d 500 (1998); *Roulette,* 97 F.3d at 303; *IDK, Inc. v. County of Clark,* 836 F.2d 1185, 1189-91 (9th Cir.1988). In the particular case of a licensing scheme that restrains First Amendment rights, there are two primary reasons to hear a facial challenge. First, there is the danger of chilling

constitutionally protected speech, because speakers may self-censor rather than seek a license or risk prosecution by speaking. *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757-62, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988). Second, when a law lacks express standards against which courts can measure the licensor's actions, as-applied challenges may be insufficient protection against content-based censorship. *Id.* These two risks, however, diminish as the conduct targeted by the law moves along the spectrum from activity that is clearly protected by the First Amendment to activity with some expressive purpose to activity with no expressive purpose. "[L]aws of general application that are not aimed at conduct commonly associated with expression and do not permit licensing determinations to be made on the basis of ongoing expression or the words about to be spoken, carry with them little danger of censorship." *Id.* at 760-61, 108 S.Ct. 2138; *cf. Broadrick v. Oklahoma,* 413 U.S. 601, 614-16, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973).

Accordingly, to be subject to facial challenge, a licensing law "must have a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat" of the risks of censorship. *Lakewood,* 486 U.S. at 759, 108 S.Ct. 2138. "[L]aws of general application that are not aimed at conduct commonly associated with expression and do not permit licensing determinations to be made on the basis of ongoing expression or the words about to be spoken," such as laws requiring building permits, pose little danger of censorship and may therefore be challenged only by the usual as-applied method. *Id.* at 760-61, 108 S.Ct. 2138. In other words, a facial challenge is proper only if the statute by its terms seeks to

regulate spoken words or patently expressive or communicative conduct, such as picketing or handbilling, *Roulette,* 97 F.3d at 303; *see also United States v. Kalb,* 234 F.3d 827, 834-35 (3d Cir.2000), or if the statute significantly restricts opportunities for expression, *see Nunez by Nunez v. City of San Diego,* 114 F.3d 935, 950 (9th Cir.1997).

The Oregon Mass Gathering Act regulates gatherings of large numbers of people overnight in open spaces. The fact that the Act regulates gatherings does not automatically mean that the Act implicates the First Amendment freedoms of speech or assembly. The First Amendment protects "expressive association"—that is, association for the purpose of "speech, assembly, petition for the redress of grievances, and the exercise of religion"—but there is no "generalized right of social association" protecting "chance encounters in dance halls" and the like. *Conti v. City of Fremont,* 919 F.2d 1385, 1388-89 (9th Cir.1990) (quoting *City of Dallas v. Stanglin,* 490 U.S. 19, 25, 109 S.Ct. 1591, 104 L.Ed.2d 18 (1989)) (internal quotation marks omitted); *see also IDK,* 836 F.2d at 1191-96; *United States v. Masel,* 54 F.Supp.2d 903, 913 (W.D.Wis.1999). It is certainly possible to imagine gatherings that might be subject to the Act but are purely recreational and devoid of expressive purpose, such as some carnivals, festivals, and exhibitions. In fact, in this case, it is not crystal clear whether the purposes of the Fair are expressive. Nonetheless, the statute is broad enough to cover gatherings that are expressive, such as large-scale demonstrations or religious ceremonies. *Cf. Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984) (assuming without deciding, while discussing an as-applied challenge, that

"overnight sleeping in connection with the demonstration is expressive conduct protected to some extent by the First Amendment").

Moreover, the Supreme Court, this court, and others have entertained the merits of facial challenges to similar statutes and regulations. *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 320-25, 122 S.Ct. 775, 151 L.Ed.2d 783 (2002); *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 133, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992); *United States v. Linick*, 195 F.3d 538, 541-42 (9th Cir.1999); *Thomas v. Chicago Park Dist.*, 227 F.3d 921, 924-25 (7th Cir.2000); *Coalition for the Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301, 1309 (11th Cir.2000). *But see Kalb*, 234 F.3d at 834-35. While it is possible that the appropriateness of the facial attacks at issue was never raised in those cases, we think it equally possible that the facial attacks were allowed because mass gatherings bear a sufficient nexus to conduct commonly associated with expression. The gathering of a large number of people to show support for a cause undeniably attracts public attention and can be an extremely effective way of promoting the group's message. We conclude that the Act bears a sufficiently close nexus to conduct commonly associated with expression that it is subject to a facial challenge.

III

The Fair argues that, because the district court issued a preliminary injunction against enforcement of some of the terms of the permit, the court was bound by the law of the case doctrine to grant summary judgment in the Fair's favor.

Appendix A

The law of the case doctrine ordinarily precludes a court from reexamining an issue previously decided by the same court or a higher court in the same case. *Old Person v. Brown,* 312 F.3d 1036, 1039 (9th Cir.2002). We review the district court's decision whether to apply the doctrine for abuse of discretion. *United States v. Lummi Indian Tribe,* 235 F.3d 443, 452 (9th Cir.2000).

Decisions on preliminary injunctions require the district court to assess the plaintiff's likelihood of success on the merits, not whether the plaintiff has actually succeeded on the merits. *See City of Anaheim v. Kleppe,* 590 F.2d 285, 289-90 (9th Cir.1978); *Beal v. Stern,* 184 F.3d 117, 129-30 (2d Cir.1999). Additionally, decisions on preliminary injunctions are just that—preliminary—and must often be made hastily and on less than a full record. *University of Texas v. Camenisch,* 451 U.S. 390, 395, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981). Thus, even though the facial challenge presented to the district court here involved primarily issues of law, we see no reason why the court should have deviated from the general rule that decisions on preliminary injunctions "are not binding at trial on the merits," *id.,* and do not constitute the law of the case, *Golden State Transit Corp. v. City of Los Angeles,* 754 F.2d 830, 832 n. 3 (9th Cir.1985), *rev'd on other grounds,* 475 U.S. 608, 106 S.Ct. 1395, 89 L.Ed.2d 616 (1986).

In addition, even if the law of the case doctrine did apply, a court properly exercises its discretion to reconsider an issue previously decided if there has been an intervening change in the law. *Thomas v. Bible,* 983 F.2d 152, 155 (9th Cir.1993). Here, the Supreme Court rendered its decision in *Thomas v.*

Chicago Park Dist., 534 U.S. 316, 122 S.Ct. 775, 151 L.Ed.2d 783, after the district court issued the preliminary injunction. As explained below, the *Thomas* decision provided important guidance in this case. Therefore, the court clearly did not abuse its discretion in reexamining the merits of the facial challenge. We now proceed to the merits.

IV

The Fair argues that the Act is constitutionally defective on its face because it confers unbridled discretion on the County in the permitting process, enabling the County to disfavor applicants with whose message the County disagrees. The facial challenge rests on three particular arguments: (1) the Act lacks a deadline for the local governing body to act on permit applications, (2) the Act lacks a provision for prompt judicial review of permit application denials, and (3) the Act gives the governing body unconstrained discretion to set the amount of the permit application fee. The first two arguments are related; we will discuss them together, followed by the third.

A

As the Fair argues, the Act contains no time limit within which the County must issue a decision on a permit application. As for judicial review, the Act does provide that any decision of a county governing body on a permit application may be appealed to a circuit court for the county, *see* OR. REV. STAT. § 433.750(5); but the Fair contends that there is no assurance that such review will be prompt. In essence, then, the Fair's argument over judicial review, like

its claim about processing permit applications, is an argument that the Act is constitutionally flawed without time limits.

In *Freedman v. Maryland,* 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), the Supreme Court held that a content-based film licensing process must contain three procedural safeguards (including the two the Fair contends are required here), or else be classified as an unconstitutional prior restraint: "(1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court." *FW/PBS, Inc. v. Dallas,* 493 U.S. 215, 227, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990) (plurality opinion) (citing *Freedman,* 380 U.S. at 58-60, 85 S.Ct. 734). In *FW/PBS,* the Court applied the first two of these safeguards—the ones the Fair argues apply here—to a licensing scheme that, like the *Freedman* scheme, was content-based (in that it targeted businesses dealing in sexually explicit speech). *See Thomas,* 534 U.S. at 322 n. 2, 122 S.Ct. 775; *see also Riley v. Nat'l Fed'n of the Blind,* 487 U.S. 781, 801-02, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988). This court has applied the same two *Freedman* safeguards to a licensing scheme specifically targeting adult bookstores. *See Baby Tam & Co., Inc. v. City of Las Vegas,* 199 F.3d 1111, 1114-15 (9th Cir.2000); *Baby Tam & Co., Inc. v. City of Las Vegas,* 154 F.3d 1097, 1100-01 (9th Cir.1998).

In *Thomas v. Chicago Park Dist.,* however, the Supreme Court clarified that none of the *Freedman* safeguards are required of content-neutral time, place, and manner permit schemes. 534 U.S. at 320-23, 122 S.Ct. 775. Here, the Oregon

Mass Gathering Act is clearly a content-neutral time, place, and manner regulation. The Act applies to all mass gatherings irrespective of the purpose for the gathering. Unlike the statutes at issue in *Freedman* and the *Baby Tam* decisions, the Act does not single out any particular activity or speech for regulation. It authorizes the Department of Human Services to promulgate regulations with respect to water supply, fire protection, and similar health and safety issues attendant on overnight gatherings of large crowds. OR. REV. STAT. § 433.760. None of these health and safety issues has anything to do with censoring the content of the applicant's speech. *See, e.g., Thomas,* 534 U.S. at 322, 122 S.Ct. 775; *United States v. Griefen,* 200 F.3d 1256, 1260 (9th Cir.2000); *United States v. Baugh,* 187 F.3d 1037, 1043 (9th Cir.1999). Additionally, once the applicant demonstrates compliance with the regulations, the governing body has absolutely no discretion to withhold the permit: the governing body "shall issue a permit upon application when the organizer demonstrates compliance with or the ability to comply with the health and safety rules. . . ." OR. REV. STAT. § 433.750(1) (emphasis added). Nothing in the Act purports to regulate gatherings on the basis of their subject matter or the organizers' or attendees' viewpoint. On its face, the Act is content-neutral.

Because it is content-neutral, the Act need not contain the procedural safeguards required of content-based regulations. The Act need not include either a deadline for consideration by the governing body or a provision for prompt judicial review. *See Thomas,* 534 U.S. at 322-23, 122 S.Ct. 775. It is well-settled, of course, that even content-neutral time, place, and manner regulations may not confer

unbridled discretion on the licensing authority, so as to stifle free expression. *Id.* at 323, 122 S.Ct. 775; *Forsyth,* 505 U.S. at 130-33, 112 S.Ct. 2395; *Shuttlesworth v. City of Birmingham,* 394 U.S. 147, 153, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969); *Cox v. Louisiana,* 379 U.S. 536, 554-58, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965); *Am. Civil Liberties Union of Nevada v. City of Las Vegas,* 333 F.3d 1092, 1106-08 (9th Cir.2003). Time, place, and manner restrictions must "contain adequate standards to guide the official's discretion and render it subject to effective judicial review." *Thomas,* 534 U.S. at 323, 122 S.Ct. 775 (citation omitted). In other words, the regulation must provide objective standards that remove the permitting decision from the whim of the official; the absence of such standards enables the official to favor some speakers and suppress others. *See Forsyth,* 505 U.S. at 133, 112 S.Ct. 2395. The question then becomes, even though the Act is not categorically required to contain the *Freedman* safeguards, does the failure to provide them confer unbridled discretion on the County?

We acknowledge the theoretical possibility that, without a deadline, Jackson County could effectively shut down gatherings by delaying permit decisions indefinitely. *See Grossman v. City of Portland,* 33 F.3d 1200, 1206 (9th Cir.1994); *Bo Fancy Prods., Inc. v. Rabun County Bd. of Comm'rs,* 267 Ga. 341, 478 S.E.2d 373, 375-77 (1996). The uncertainty of knowing when, if ever, the local governing body will act on the permit application may hamstring the arrangements for such large events, which must be made far in advance. In fact, in this case, the uncertainty inherent in the 1996 application process was one of the Fair's primary reasons for bringing suit.

In discussing why the content-neutral ordinance in *Thomas* adequately limited the discretion of the decision-maker, the Court observed that the ordinance required the municipality to process applications within 28 days. 534 U.S. at 324, 122 S.Ct. 775. But the Court did not indicate that the deadline was an essential component of a reasonable time, place, and manner regulation. To read the opinion that way would flatly contradict the decision's clear holding that time, place, and manner regulations need not contain the *Freedman* safeguards. *Thomas,* 534 U.S. at 322-23, 122 S.Ct. 775. Despite the Court's reference to the 28-day deadline, therefore, we conclude that the procedural safeguards doctrine is relevant only to explicit censorship schemes, not to content-neutral schemes. *Granite State Outdoor Advertising, Inc. v. City of St. Petersburg,* 348 F.3d 1278, 1281-83 (11th Cir.2003) (absence of time limits for municipality to process permit applications does not render content-neutral sign ordinance unconstitutional); *Griffin v. Sec'y of Veterans Affairs,* 288 F.3d 1309, 1328 (Fed.Cir.2002) (procedural safeguards requirement limited to "explicit censorship scheme[s]" that "by definition [are] not content-neutral").

Here, the overnight mass gatherings the state seeks to regulate raise special health and safety issues because of their size and duration. The state has an eminently valid interest in ensuring the health and safety of its residents and visitors at such large, lengthy events. *Cf. Grossman,* 33 F.3d at 1206 (noting, in discussing a permit requirement for demonstrations in public parks, the greater burden that larger groups place on park facilities). Just as the complexity of these events requires applicants for mass gathering permits

to prepare well in advance, the local governing bodies responsible need time to evaluate applications and conduct inspections, making a strict deadline for permit action impracticable. The lack of a permit application deadline is not sufficient to invalidate the Act on a facial challenge. *Cf. Outdoor Sys., Inc. v. City of Mesa,* 997 F.2d 604, 613 (9th Cir.1993) (holding municipal sign codes constitutional even though the codes lacked a time limit for processing applications). Should abuse occur, it may be remedied adequately through as-applied challenges like the Fair's § 1983 claim (which is not before us on appeal). *See Thomas,* 534 U.S. at 325, 122 S.Ct. 775; *Granite State,* 348 F.3d at 1282.

B

The Fair's remaining contention is that the Act confers excessive discretion on the governing body to set permit application fees. As noted above, a time, place, and manner restriction must "contain adequate standards to guide the official's discretion and render it subject to effective judicial review." *Thomas,* 534 U.S. at 323, 122 S.Ct. 775 (citation omitted). With regard to fees in particular, there is nothing unconstitutional in a municipality's charging a fee to "meet the expense incident to the administration of the act and to the maintenance of public order in the matter licensed." *Cox v. New Hampshire,* 312 U.S. 569, 577, 61 S.Ct. 762, 85 L.Ed. 1049 (1941) (internal quotation marks omitted); *see also Murdock v. Pennsylvania,* 319 U.S. 105, 113-14, 116, 63 S.Ct. 870, 87 L.Ed. 1292 (1943). A state may, in other words, impose a permit fee that is reasonably related to legitimate content-neutral considerations, such as the cost of

administering the ordinance, the cost of public services for an event of a particular size, or the cost of special facilities required for the event. *See Church of the Am. Knights of the Ku Klux Klan v. City of Gary,* 334 F.3d 676, 682 (7th Cir.2003); *Marijuana Prohibition,* 219 F.3d at 1320-24 & n. 16; *Northeast Ohio Coalition for the Homeless v. City of Cleveland,* 105 F.3d 1107, 1109-10 (6th Cir.1997); *cf. Baldwin v. Redwood City,* 540 F.2d 1360, 1372 & nn. 32-33 (9th Cir.1976).

This principle is subject to an important limitation: the regulation must provide objective standards that do not leave the amount of the fee to the whim of the official, enabling the official to favor some speakers and suppress others. *Forsyth,* 505 U.S. at 130-33, 112 S.Ct. 2395. The ordinance in *Forsyth* required that every permit applicant "shall pay in advance . . . a sum not more than $1,000 for each day" of a parade, procession, or open air public meeting, and stated that the administrator "shall adjust the amount to be paid in order to meet the expense incident to the administration of the Ordinance and to the maintenance of public order in the matter licensed." *Id.* at 126- 27, 131 n. 9, 112 S.Ct. 2395. The administrator testified that in that particular case he had chosen not to include the cost of his clerical support and staff in the fee, and that he had deliberately undervalued the cost of his time spent processing the application. *Id.* at 132, 112 S.Ct. 2395. He also testified that he had in fact charged other groups significantly lower fees, or no fee at all. *Id.* Based on this uneven implementation, the Court struck down the ordinance, because "[t]he decision how much to charge for police protection or administrative time—or even whether to charge at all—is left to the whim of the administrator." *Id.* at 133.

Here, as noted above, the Act provides that a county governing body "may charge permit applicants a fee reasonably calculated to reimburse the county for its reasonable and necessary costs in receiving, processing and reviewing applications for permits to hold outdoor mass gatherings." OR. REV. STAT. § 433.750(6). The fee "shall not exceed $5,000 and shall not be charged when the governing body finds, by a preponderance of the evidence presented to the governing body, that the applicant is unable to reimburse the governing body." *Id.* The Fair argues that, because the statute states that the governing body "may" charge the fee, rather than "shall" or "must" charge the fee, the provision allows the governing body to charge or not to charge at its whim, in violation of *Forsyth.*

We reject this argument for two reasons. First, unlike in *Forsyth,* we lack actual evidence of a pattern of abuse. Second, the Supreme Court rejected a similar argument in *Thomas,* which followed *Forsyth.* In *Thomas,* the petitioners argued that the use of the word "may" in the provision at issue allowed the permitting authority to waive the permit requirements for favored speakers, but not for others. 534 U.S. at 324, 122 S.Ct. 775. In response, the Court stated that "[g]ranting waivers to favored speakers (or, more precisely, denying them to disfavored speakers) would of course be unconstitutional, but we think that this abuse must be dealt with if and when a pattern of unlawful favoritism appears, rather than by insisting upon a degree of rigidity that is found in few legal arrangements." *Id.* at 325, 122 S.Ct. 775. We reject the Fair's argument on the same basis. We have no evidence of a pattern of abuse like that presented in *Forsyth* or referenced in *Thomas.*

As for the decision how much to charge, the provision does leave some discretion over the amount of the fee to the governing body, but the discretion is not so broad that the statute fails the test of *Thomas* and *Forsyth.* In *Forsyth,* the ordinance, in authorizing the administrator to "adjust the amount to be paid [between zero and $1,000] in order to meet the expense incident to the administration of the Ordinance and to the maintenance of public order in the matter licensed," 505 U.S. at 127, 112 S.Ct. 2395 (quoting the ordinance), completely lacked any standard cabining the administrator's discretion, *id.* at 132-33, 112 S.Ct. 2395. Here, the Act does contain a standard: the fee must be "reasonably calculated" based on the county's "reasonable and *necessary* costs" in processing applications, § 433.750(6) (emphasis added), and in any event may not exceed $5,000 and shall not be charged when the applicant cannot pay, *id.* These limits objectively constrain the governing body's discretion and allow effective judicial review. *Cf. Transp. Alternatives, Inc. v. City of New York,* 340 F.3d 72, 78 (2d Cir.2003) (striking down regulation affording unrestricted discretion whether to impose a fee at all, as well as unrestricted discretion as to the fee amount). Other systems might constrain the county's discretion more narrowly—perhaps, for instance, a content-neutral sliding scale of fees, *see Marijuana Prohibition,* 219 F.3d at 1320-24 & n. 16; *MacDonald v. Chicago Park Dist.,* 132 F.3d 355, 362-63 (7th Cir.1997), a lower maximum fee, or some requirement that the County provide the applicant with an explanation of the expenses charged. However, we see no reason why that level of specificity is absolutely required under the "unbridled discretion" theory.

Finally, the statutory standard leaves no possibility of a heckler's veto. That is, the standard does not allow the governing body to gauge the reaction the applicant's message will generate and set the fee according to the projected costs of policing hostile listeners, a feature the Supreme Court disapproved in *Forsyth* as impermissibly content-based. 505 U.S. at 134, 112 S.Ct. 2395; *see also Church of the Am. Knights,* 334 F.3d at 680-82; *MacDonald v. City of Chicago,* 243 F.3d 1021, 1032-34 (7th Cir.2001). There is always a risk that, in a given case, the county commissioners might abuse their power under the Act; but the Fair or any other applicant is free to contend in an as-applied challenge that the commissioners have applied the fee provision unlawfully. Indeed, the Fair has challenged the fee charged in 1996 in its § 1983 claim against the commissioners and the sheriff (a claim that is not before us). We do not have to preterm it reasonable health and safety regulations on the chance that a public official might abuse his discretion and trample on First Amendment rights. On its face the provision is constitutional. In sum, we uphold the challenged provisions of the Act as consistent with the First Amendment.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON DATED APRIL, 2002

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

Civil No. 96-3067-CO

SOUTHERN OREGON BARTER FAIR,

Plaintiff,

v.

JACKSON COUNTY; JACKSON COUNTY COMMISSIONERS; JACKSON COUNTY SHERIFF; and as individuals RIC HOLT; JACK WALKER; SUE KUPILLAS; AND ROBERT KENNEDY,

Defendants.

ORDER

COONEY, Magistrate Judge:

Plaintiff Southern Oregon Barter Fair brings this civil rights action against defendants Jackson County, Jackson County commissioners, the Jackson County sheriff, and individuals Ric Holt, Jack Walker, Sue Kupillas, and Robert Kennedy. In its third amended complaint, plaintiff challenges the permit scheme of the Oregon Outdoor Mass Gathering Act, ORS 433.735 to 433.700, and ORS 433.90 (OMGA), as invalid facially and as applied. Plaintiff includes claims

for damages under 42 U.S.C. sections 1983 and 1985, for permit fees and violation of right to redress of grievance, and state law claims for slander, trespass, intentional interference with business relations, and violation of state constitutional rights. Plaintiff seeks declaratory and injunctive relief, damages, punitive damages, attorneys' fees, and costs and disbursements. The court entered a preliminary injunction on October 2, 1996, enjoining defendants from requiring payment of administrative fees, no parking sign fees, police protection fees, and health and planning inspection fees, or the deposit of any sums of money by plaintiff; and from requiring written confirmation from the County Sheriff that plaintiff's security plan or security firm is adequate (#34). The State of Oregon has intervened for the purpose of defending the constitutionality of ORS 433.735 et seq. This court has jurisdiction pursuant to 28 U.S.C. sections 1331 and 1367. The parties have executed written consents for entry of final judgment by a magistrate judge (# 16). 28 U. S.C. § 636(c). Before the court are Jackson County defendants' motion for summary judgment (#95), defendant-intervenor State's motion for summary judgment (#98), and plaintiff's motion for summary judgment (#108), all of which are opposed. Jackson County defendants join in defendant-intervenor's motion for summary judgment with regard to counts one through three. In plaintiff's response to Jackson County defendants' motion for summary judgment, plaintiff conceded and withdrew the following claims from consideration: that portion of count four, damages for violation of 42 U.S.C. § 1983, paragraph 34, relating to past paid permit fees; count five, damages for violation of 42 U.S.C. § 1985; first supplemental claim, violation of

Appendix B

42 U.S.C. § 1983; third supplemental claim, slander; and sixth supplemental claim, violation of state constitutional rights.

I. FACTS

The court makes the following findings of fact[1]:

1. Plaintiff did not respond to either Jackson County defendants' or defendant-intervenor's statements of fact, but filed its own statement of facts. Jackson County defendants initially responded to plaintiff's concise statement of facts filed with its motion with an "objection to inadmissible evidence," requesting the court to strike and disregard plaintiff's opposition to the extent it was based upon pleadings and inadmissible evidence. Jackson County defendants seek to strike all inadmissible evidence in every affidavit submitted, but do not identify the inadmissible evidence. Defendant-intervenor does not respond to plaintiff's concise statement. Plaintiff was subsequently granted leave to submit a second concise statement with its sur-reply, which deleted references to the complaint and points to evidence in support of its proposed facts; Jackson County defendants were given time to respond to the second statement of facts, but no response has been filed. To the extent that Jackson County defendants' request to strike inadmissible evidence applies to plaintiff's second concise statement, that request is denied by the court for defendants' failure to identify the purported inadmissible evidence. In accordance with Local Rule 56.1(f), the facts set forth in the parties' statements of fact which are not specifically denied or otherwise controverted are deemed admitted for purposes of summary judgment.

The court's statement of facts includes all facts proposed by the parties except those made moot by claims or arguments withdrawn, or duplication of facts. Local Rule 56.1(e) provides: "**Scope of Judicial Review.** Except as otherwise required by law, when resolving a motion for summary judgment, the court has no independent duty to search and consider any part of the court record not otherwise referenced in the separate concise statements of the parties."

Appendix B

On December 4, 1995, defendant commissioners held a private meeting with Mr. Jim Christopherson, a self-declared opponent to plaintiff's religious gathering, to discuss issues relevant to defendant commissioners, consideration of plaintiff's application for permit, and of the pending changes to defendants' Barter Fair Ordinance. By letter of February 8, 1996, to defendants' counsel, Ms. Arminda J. Brown, (Third Am. Compl. Attach. E), plaintiff requested copies of the minutes of said meeting and an equal opportunity to privately meet with defendant commissioners at the site of plaintiff's religious gathering. To date, defendants have failed or refused to respond to plaintiff's requests. (Defs. Answer Par. 4.)

In the beginning of January 1996, plaintiff requested an outdoor mass gathering permit application. This request was denied by defendants' agent because defendant commissioners were in the process of drafting a new ordinance, and a new permit application form based on the forthcoming ordinance had not yet been developed. (Pl. Ex. 2 Lee Aff.; Pl. Ex. 3 January 31, 1996, letter from Jackson County.)

On or about April 1, 1996, defendants' agent gave plaintiff a permit application form which was identical to the permit form utilized by plaintiff for the religious gathering in 1995. (Defs. Answer Par. 5.)

On or about April 3, 1996, plaintiff applied to Jackson County for an outdoor mass gathering permit. (Third Am. Compl. at 5.)

Appendix B

Although plaintiff's application was submitted in April 1996, defendants did not schedule a hearing on the Permit until July 22, 1996, at least 90 days after the permit was submitted and more than five months after plaintiff first applied for a permit application. (Defs. Answer Par. 6.)

Defendant Jackson County commissioners held a public meeting on plaintiff's permit application on July 22, 1996. (Third Am. Compl. at 6.) At the hearing, Mr. Bob Evans, owner of the property which was the intended site for the 1996 Barter Fair, informed the county commissioners that there was a possibility that the property would not be available for the 1996 Barter Fair. (Defs. Ex. 1 Bloom Aff.; Defs. Ex. 2 Minutes of July 22, 1996, Jackson County Board of Commissioners public hearing.) Defendant Kennedy testified at the hearing that the Barter Fair religious gathering had no merit and should not be allowed to continue because of some neighbors' hostile reaction to the content of plaintiff's gathering and defendant Kennedy's beliefs that were hostile to the lifestyle, beliefs, and practices of the people attending plaintiff's annual religious gathering. (Defs. Ex. 2 Minutes of July 22, 1996, Jackson County Board of Commissioners meeting.) At the July 22,1996, permit application hearing, defendant commissioners, claiming discretion to do so, withheld a decision on plaintiff's permit application. Defendants rescheduled the hearing to August 27, 1996. (Defs. Answer Par. 7.)

Because the permit under the OMGA was site specific, defendant Jackson County continued the hearing for one month to determine the status of the property and to allow one of plaintiff's organizers to provide information lacking in the permit application. (Defs. Ex. 2 at 7-8.)

Appendix B

On August 28, 1996, plaintiff requested an indigency hearing to establish plaintiff's inability to pay the demanded permit fee, in order to prevent the permit from being revoked. (Third Am. Compl. Attach. C; Defs. Answer Par. 8.)

On August 29, 1996, defendant commissioners approved and issued a conditional permit to plaintiff to hold its annual religious gathering on private property. (Third Am. Compl. at 7 par. 21; Third Am. Compl. Attach. D.)

Jackson County defendants set the level of law enforcement presence for the 1994 and 1995 Barter Fair events at approximately four officers in the parking lot area and, with plaintiff's permission, two officers were allowed to conduct a walk-through twice during the daylight hours of each day of the event. (Pl. Ex. 1 Venet Aff. Par. 5; Pl. Ex. 2 Lee Aff. Par. 10; Pl. Ex. 16 M. Fate Aff. Pars. 3 & 4.)

Jackson County defendants invaded the Barter Fair event and property with an armed and hostile law enforcement presence of about 100 police officers. (Pl. Ex. 1 Venet Aff. Pars. 5 & 7; Pl. Ex. 2 Lee Aff. Par. 9; Pl. Ex. 10 Apilada Aff. Pars. 3 & 5; Pl. Ex. 11A. Brentmar Aff. Par. 6; Pl. Ex. 12 O. Brentmar Aff. Par. 5; Pl. Ex. 13 Clark Aff. Pars.5-9; Pl. Ex. 14 Drew Aff. Par. 3; Pl. Ex. 17 Fossen Aff. Pars. 10-12; Pl. Ex. Ex. 18 Fate Jahnig Aff. Par. 5; Pl. Ex. 19 Kiyak-Boughton Aff. Par. 5; Pl. Ex. 22 Shafer-Meek Aff. Pars. 3- 7; Pl. Ex. 23 Shafer Aff. Pars. 3-6; Pl. Ex. 9-17-01 Ward Aff. Pars. 4-6.)

Plaintiff contends that defendants' actions were retaliation against plaintiff and plaintiff's vendors, customers,

and staff because of plaintiff's success in court with its redress of grievances against defendants' unconstitutional actions and threats. (Pl. Ex. 5 July 16, 1996, Memo from Robert Kennedy; Pl. Ex. 8 October 5, 1996, Memo from Richard Allen; Pl. Ex. 1 Venet Aff. Pars. 5 & 7; Pl. Ex. 4 Fence Aff. Par. 8; Pl. Ex. 10 Apilada Aff. Pars. 3 & 4; Pl. Ex. 11 A. Brentmar Aff. Par. 6; Pl. Ex. 13 Clark Aff. Pars. 3-9; Pl. Ex. 14 Drew Aff. Par. 3; Pl. Ex. 16 M. Fate Aff. Pars. 4, 7 & 8; Pl. Ex. 17 Fossen Aff. Pars. 5, 7, 9 & 10; Pl. Ex. 18 Fate Jahnig Aff. Par. 9; Pl. Ex. 19 Kiyak-Boughten Aff. Par. 3; Pl. Ex. 22 Shafer-Meek Aff. Par. 3; Pl. Ex. 24 Sharp Aff. Par. 3; Pl. Ex. 25 Schwimmer Aff. Pars. 6, 7 & 9; Pl. Ex. 27 Von Frederick Aff. Par. 4; Pl. Ex. 9-17-01 Ward Aff. Par. 4.)

Plaintiff contends that defendants' use of law enforcement at the Barter Fair was to punish and harass plaintiff for utilizing the court to gain redress of grievances against defendants' unlawful governmental actions. (Pl. Ex. 5 July 16, 1996, Memo from Robert Kennedy; Pl. Ex. 8 October 5, 1996, Memo from Richard Allen.)

Defendant Kennedy ordered at least 100 officers to patrol the event, harassing fairgoers and vendors. (See Pl. Ex. 1 Venet Aff.; Pl. Ex.2 Lee Aff.; Pl. Ex.4 Fence Aff.; Pl. Ex. 10 Apilada Aff.; Pl. Ex. 11 A. Brentmar Aff.; Pl. Ex. 12 O. Brentmar Aff.; Pl. Ex. 13 Clark Aff.; Pl. Ex. 14 Drew Aff.; Pl. Ex. 15 L. Fate Aff.; Pl. Ex. 16 M. Fate Aff.; Pl. Ex. 17 Fossen Aff.; Pl. Ex. 18 Fate Jahnig Aff.; P1. Ex. 19 Kiyak-Boughton Aff; Pl. Ex. 20 Ohanian Aff.; Pl. Ex. 21 Roth Aff.; Pl. Ex. 22 Shafer-Meek Aff.; Pl. Ex. 23 Shafer Aff.; Pl. Ex. 24 Sharp Aff.; Pl. Ex. 25 Schwimmer Aff.; Pl. Ex. 26 Shipley Aff.; Pl. Ex. 27 Von Frederick Aff.; Pl. Ex.

9-17-01 Ward Aff.; Pl. Exs. 5 & 6, Sheriffs expenditures for 1996 Barter Fair.)

Due to the actions of defendant Sheriff Kennedy, attendance at the 1996 Barter Fair fell dramatically from previous years (when all projections predicted a significant increase), and vendors refused to attend, causing a substantial loss in revenue. (Pl. Ex. 1 Venet Aff. Par. 10; Pl. Ex. 2 Lee Aff. Par. 7; Pl. Ex. 10 Apilada Aff. Par. 6; Pl. Ex. 11 A. Brentmar Aff. Par. 4; Pl. Ex. 12 O. Brentmar Aff. Par. 6; Pl. Ex. 18 Fate Jahnig Aff. Par. 7; Pl. Ex. 19 Kiyak-Boughton Aff. Pars. 3 & 7; Pl. Ex. 20 Ohanian Aff. Pars. 4 & 5; Pl. Ex. 24 Sharp Aff. Pars. 3-5; Pl. Ex. 25 Schwimmer Aff. Pars. 7 & 9; Pl. Ex. 27 Von Frederick Aff. Par. 4.)

Plaintiff has not applied for a mass gathering permit, or engaged in any other preparations for a mass gathering, since 1996. During that period, the OMGA has presented no obstacle to plaintiff organizing a mass gathering. (Leith Aff. Par. 4.)

II. LEGAL STANDARD

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, a moving party is entitled to summary judgment as a matter of law "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c); *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir.), *cert. denied*, 502 U.S. 994 (1991). The moving party must carry the initial burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24

(1986). The moving party meets this burden by identifying for the court portions of the record on file which demonstrate the absence of any genuine issue of material fact. *Celotex Corp.*, 477 U.S. at 322-24; *Bhan*, 929 F.2d at 1409. In assessing whether a party has met its burden, the court must view the evidence in the light most favorable to the non-moving party. *Allen v. City of Los Angeles*, 66 F.3d 1052 (9th Cir. 1995). All reasonable doubts must be resolved in the non-movants favor. *Intel Corp. v. Hartford Accident and Indem. Co.*, 952 F.2d 1551, 1558 (9th Cir. 1991).

If the moving party meets its burden with a properly supported motion, the burden then shifts to the opposing party to present specific facts which show there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Intel Corp.*, 952 F.2d at 1558; *Auvil v. CBS "60 Minutes"*, 67 F.3d 816 (9th Cir. 1995), *cert. denied,* 517 U.S. 1167 (1996); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 & n.4 (1986). If the moving party presents evidence which, taken by itself, would establish the right to a directed verdict at trial, the motion for summary judgment must be granted, in the absence of any significant probative evidence tending to support the opposing party's theory of the case. *THI-Hawaii, Inc. v. First Commerce Fin. Corp.*, 627 F.2d 991, 993-94 (9th Cir. 1980); *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 290, *reh'g denied*, 393 U.S. 901(1968). Conclusory allegations, unsupported by factual material, are insufficient to defeat a motion for summary judgment. *Taylor v. List,* 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposing party must, by affidavit or as otherwise provided by Rule 56, designate specific facts which show there is a genuine issue for trial. *Leonard v. Clark.* 12 F.3d 885, 888 (9th Cir. 1994).

Appendix B

III. DISCUSSION

The court will first consider the cross-motions by defendant-intervenor State and plaintiff which address the facial validity of the OMGA, and then consider Jackson County defendants' motion for summary judgment which is opposed by plaintiff.

Defendant-Intervenor State of Oregon's and Plaintiff's cross-motions – Counts One through Three

Defendant-intervenor State moves for summary judgment as to counts one, two and three on the grounds[2] that plaintiff's facial challenge to the OMGA is moot; plaintiff may not challenge the OMGA on its face because it is a law of general application, it does not regulate expression, and it vests no official with unbridled discretion; and the OMGA is not facially unconstitutional because it is a valid time-place-manner regulation, and does not impose a prior restraint on protected expression. Plaintiff moves for summary judgment as to counts one, two, and three on the grounds that the law of the case requires the court to allow summary judgment; and the OMGA is unconstitutional on its face.

Law of the case doctrine

Plaintiff contends that the law of the case doctrine applies here, so that defendant-intervenor, who had an opportunity

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2. The State withdraws its ground that plaintiff lacks legal capacity to sue.

at the time of the preliminary injunction hearing but did not use it, has presented no changes in applicable law to alter the court's initial finding and, therefore, the OMGA was and remains unconstitutional on its face. Defendant-intervenor contends that the doctrine is inapplicable to decisions on preliminary injunction and the parties are free to litigate the merits. Plaintiff replies that the principle argued by the State is adhered to when there are merits to litigate, but where a facial challenge is asserted, "there are no facts or merits to litigate," (Pl. Sur-reply at 1), and law of the case applies. Plaintiff contends that, where actual success on the merits is determined, versus likelihood of success on the merits--the standard at the preliminary injunction phase-- there is nothing more to litigate.

It has been said that the law of the case doctrine "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power." *Messinger v. Anderson*, 225 U.S. 436, 444 (1912). Generally, a court's prior decision on a preliminary injunction does not constitute the law of the case; the parties remain free to litigate the merits. *Golden State Transit Corp. v. City of Los Angeles*, 754 F.2d 830 (9th Cir. 1985), *rev'd on other grounds,* 475 U.S. 608 (1986). Courts justify reconsideration of an issue previously decided on the grounds of a change in the controlling law, the availability of new evidence, or the need to correct a clearly erroneous decision to prevent manifest injustice. *See White v. Murtha*, 377 F.2d 428, 431-32, *reh'g denied*, 381 F.2d 34 (5th Cir. 1967); *Wilder v. Bernstein*, 645 F. Supp. 1292, 1310 (S.D.N.Y. 1986), *aff'd*, 848 F.2d 1338 (2d Cir. 1988). A party who intervenes is generally bound by law of the case. *See* 18 Charles A. Wright et al., Federal Practice and Procedure section 4478, at 800 (1981).

Appendix B

The court notes that the hearing on plaintiff's motion for preliminary injunction was held on September 30, 1996, and the preliminary injunction was entered on October 2, 1996. On October 2,1996, the court certified the question of the constitutionality of the state statute to the Oregon Attorney General (#35). The court received notice on October 17, 1996, that the State would not intervene in this matter (#40). The State subsequently moved to intervene in April 2001, which motion was granted by the court (#92). Thus, it appears that the State had no notice of the pendency of this case until after the preliminary injunction was argued and entered.

At the preliminary injunction stage, the court determined that defendants were enjoined from requiring payment of certain fees, and were enjoined from requiring written confirmation from the sheriff regarding plaintiff's security plan and firm. (#34 Oct. 2, 1996, Prelim. Inj. at 2.) There was no rationale set forth by the court for its rulings at that time and, further, there was no finding as to all bases for plaintiff's constitutional challenge.

On this record, the court concludes that it will address the arguments raised by defendant-intervenor State in its motion for summary judgment.

Mootness

Defendant contends that plaintiff's facial challenge is moot because plaintiff has not applied for a mass gathering permit since 1996, it lacks an adequate site to hold a mass gathering and has since 1996 and, therefore, the OMGA presents no obstacle to plaintiff. In response, plaintiff

contends that dissolution was accidental and its corporate status has been reinstated. Plaintiff asserts that defendant-intervenor is aware from deposition testimony that it has continued its efforts over the years to find a suitable site and to organize a mass gathering. Defendant-intervenor replies that the deposition testimony offered, if cognizable, establishes that plaintiff's ability to conduct future barter fairs is speculative. Plaintiff replies that an issue is moot only if there is no chance of the issue ever being raised again, which is not the case here.

This case is distinguishable from *City News & Novelty, Inc. v. Waukesha*, 531 U.S. 278 (2001), upon which defendant-intervenor relies. In *Waukesha*, it was undisputed that City News had ceased to operate and no longer sought to renew its adult business license. Because City News had left the business and had asserted no intent to reenter and pursue a license, the Court found that there was no live controversy and, therefore, the case was moot. Here, defendant-intervenor has withdrawn its argument that plaintiff lacks legal capacity to sue,[3] which it relies on in part in support of its argument that plaintiff's challenge is moot. Plaintiff offers the deposition testimony of Alan Venet, president of Southern Oregon Barter Fair, which sets forth plaintiff's efforts since 1996 to stage a barter fair. Mr. Venet testifies that, with the exception of a small gathering in Harrisburg, which was intended as a fundraising event, no barter fair event has been held due to lack of a site and

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3. Defendant-intervenor accepts that plaintiff's corporate status has been reinstated, which relates back to the date of dissolution, ORS 65.654(3) (2001).

funding. (Pl. Resp. Ex. Venet Dep. at 15-23, 27-44, 47-50). It seems clear from plaintiff's evidence that it is still pursuing having a fair in the future; there is nothing to indicate that it has ceased operations and has no intent to hold a fair once a site is found. Its continuing efforts are reinforced by its request for reinstatement of its corporate status. The situation is not speculative, as was the circumstances in *City News*. Accordingly, the court finds that plaintiff's constitutional challenge is not moot and defendant-intervenor's motion for summary judgment on this ground is denied.

Facial challenge

Defendant-intervenor contends that plaintiff may not challenge the OMGA on its face because the OMGA is a statute of general application concerned with the health and safety implications of large multiple-day events, which does not regulate expression, and which vests no official with unbridled discretion. Plaintiff contends that a facial challenge is appropriate because the OMGA is a prior restraint on speech, where approval of a government agency prior to expression or conduct commonly associated with expression, creates dangers of abuse. Defendant-intervenor replies that plaintiff does not apply the proper test. It asserts that camping en masse for a period of days is not an activity commonly associated with expression. Plaintiff replies that a primary basis for its challenge is the absence of required time limits for decision making, which is an appropriate basis for a facial challenge. It contends that its constitutional right to gather is equal to those rights discussed by the Supreme Court in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 223-27 (1990), wherein facial challenges are allowed.

Appendix B

The court notes that whether plaintiff may bring a facial challenge to the OMGA was implicitly decided at the preliminary injunction phase, when the court allowed plaintiff to go forward. "It is well established that in the area of freedom of expression an overbroad regulation may be subject to facial review and invalidation. . . ." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 129 (1992). "[T]he Court has permitted a party to challenge an ordinance under the overbreadth doctrine in cases where every application creates an impermissible risk of suppression of ideas, such as an ordinance that delegates overly broad discretion to the decisionmaker, and in cases where the ordinance sweeps too broadly, penalizing a substantial amount of speech that is constitutionally protected." *Id.* at 129-30 (citations omitted).

In making its argument that plaintiff may not facially challenge the OMGA, defendant-intervenor argues that the OMGA is a law of general application and does not regulate expression. Plaintiff does not specifically address these arguments.

The Court in *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750 (1988), determined that it is when statutes threaten two identified risks to a "significant degree" that courts must entertain a facial challenge to the law: (1) the risk of self-censorship by speakers in order to avoid being denied a license to speak; and (2) the risk of effectively detecting, reviewing, and correcting content-based censorship "as applied" without standards by which to measure the licensor's action. The Court stated:

> Therefore, a facial challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers. This is not to say that the press or a speaker may challenge as censorship any law involving discretion to which it is subject. The law must have a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat of the identified censorship risks.

Id. at 759. Defendant-intervenor asserts that the OMGA is concerned with the health and safety aspects of large-scale multiple-day events; it argues that the OMGA is like a building code which permits construction if there is adequate water supply and toilet facilities, *Plain Dealer,* 486 U.S. at 761. Defendant-intervenor identifies activities such as picketing and parading, *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 152 (1969), and handbilling, *Broadrick v. Oklahoma,* 413 U.S. 601, 612-13 (1973), as protected activities. In *Roulette v. City of Seattle*, 97 F.3d 300 (9th Cir. 1996), the Ninth Circuit did not allow a facial challenge to an ordinance prohibiting lying or sitting on the sidewalk because by its terms, such conduct was not integral to, or commonly associated with, expression. *Id.* at 304. The court stated, "Consistent with this speech-protective purpose, the Supreme Court has entertained facial freedom-of-expression challenges only against statutes that, 'by their terms,' sought to regulate 'spoken words,' or patently 'expressive or communicative conduct' such as picketing or handbilling."

Id. at 303 (fn. omitted) (citing *Broadrick*, 413 U.S. at 612-13.) The *Roulette* court noted that, under the ordinance, persons could still, subject to other law, conduct expressive activities such as solicitation of voter registration, distribute educational materials, and hold rallies. 97 F.3d at 304. The Ninth Circuit has stated that, "A prior restraint exists when the enjoyment of protected expression is contingent upon the approval of government officials." *Baby Tam & Co. v. City of Las Vegas,* 154 F.3d 1097, 1100 (9th Cir. 1998); *Forsyth County*, 505 U.S. at 130 [ordinance "requiring a permit and a fee before authorizing public speaking, parades, or assemblies . . . is a prior restraint on speech"].

Defendant-intervenor argues that *United States v. Linick*, 195 F.3d 538 (9th Cir. 1999), sets the outer boundary for facial challenges and does not support a facial challenge here. In *Linick*, the Ninth Circuit considered a facial challenge to a noncommercial group use permit for a gathering in national forest lands; the group met annually in national forest land to pray for peace and discuss political and environmental issues. The court determined that, "a party subject to a regulatory scheme may challenge the scheme on its face, without first applying for a permit, whenever the scheme allegedly vests authorities with substantial power to allow or deny expressive activity." *Id.* at 541 (citing *Shuttlesworth*, 394 U.S. at 151; *Freedman v. Maryland,* 380 U.S. 51, 56 (1965); *Nunez v. City of San Diego,* 114 F.3d 935, 949 (9th Cir. 1997)). The court found that the federal regulation at issue bore a striking resemblance to the "terms and

conditions" provision of the ordinance at issue in *Plain Dealer*, 486 U.S. at 754, and found it unconstitutional on its face.[4]

Defendant asserts that en masse camping at an event site, which the statute regulates, is not patently expressive conduct. It asserts that the critical factor of camping/sleeping at the site, which defines a mass gathering, is not sufficiently expressive. From its arguments, it appears that defendant-intervenor focuses on the speech aspects of First Amendment and does not address First Amendment freedoms of association and assembly.

The OMGA provides that an "'Outdoor mass gathering'" "unless otherwise defined by county ordinance," is defined as follows: "an actual or reasonably anticipated assembly of more than 3,000 persons which continues or can reasonably be expected to continue for more than 24 consecutive hours but less than 120 hours within any three-month period and which is held primarily in open spaces and not in any permanent structure." ORS 433.735(1) (2001)[5]; OAR 333-039-0010(2).

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4. Subsequent to that finding, the court held that an interpretive rule that included a self-imposed limitation on the Forest Services' previously unbridled discretion in attaching terms and conditions to permits, preserved its constitutionality, after finding that the permit scheme with the interpretive rule was a valid time, place, and manner regulation.

5. Plaintiff challenges the 1995 OMGA, ORS 433.735 to 433.770, and ORS 433.990. Except for an amendment to ORS 433.990 in 2001, which is not relevant to the issues in this case, the 2001 OMGA is the same as the 1995 OMGA, and will be used by the court.

Appendix B

It appears that, under the statute and the administrative regulations, it is the assembly of a large group of people at one site on open spaces--more than 3,000 people for more than twenty-four hours--which is the critical factor, which would require the health and safety considerations, rather than "camping" per se as defendant-intervenor argues. *See Linick,* 195 F.3d 538, *supra.* A Texas district court in *United States v. Rainbow Family*, 695 F. Supp. 294, 308 (E.D. Tex. 1988), noted that "the act of camping in the National Forests [by those associated with the Rainbow Family] may have political connotations and qualify as protected symbolic activity." (And cases cited; citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), stating: "(assuming, but not deciding, that overnight sleeping in connection with demonstration is expressive conduct 'protected to some extent by the First Amendment')".) The *Rainbow Family* court determined that it was "unquestionable that rights of speech, worship, and association, closely guarded under the First Amendment, are operative here." *Id.* The Court in *Buckley v. Valeo,* 424 U.S. 1, 25 (1976) (per curiam), which concerned the right of association, stated: "The Court's decisions involving associational freedoms establish that the right of association is a 'basic constitutional freedom,' that is 'closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society."' (citations omitted.) The Court in *Shuttlesworth*, which considered an ordinance regulating parade, procession, or other public demonstration, stated:

> Even when the use of its public streets and sidewalks is involved, therefore, a municipality

> may not empower its licensing officials to roam essentially at will, dispensing or withholding permission to speak, assemble, picket, or parade according to their own opinions regarding the potential effect of the activity in question on the 'welfare, 'decency,' or 'morals' of the community.

394 U.S. at 153.

It appears under these authorities that the mass gathering statute bears a close enough nexus to expression, or conduct commonly associated with expression, to pose a substantial threat of the risks of censorship.

Defendant-intervenor also argues that the OMGA does not vest an official with "unbridled discretion." Plaintiff notes that one of the bases for its facial challenge is the alleged absence of required time limits for decision making. "A facial challenge is also appropriate when there is a lack of adequate procedural safeguards necessary to ensure against undue suppression of protected speech." *Baby Tam*, 154 F.3d at 1100 (citing *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 223-24 (1990) (plurality opinion)).

Based on the foregoing authorities, the court concludes that plaintiff may properly bring a facial challenge to the OMGA. Defendant-intervenor's motion for summary judgment on this ground is denied.

Appendix B

Prior restraint versus time, place and manner regulation

Defendant-intervenor argues that the OMGA does not impose a prior restraint on protected expression because it does not regulate speech or expressive activity, it is content-neutral, and it does not vest unbridled discretion in any government official; defendant asserts that the OMGA is a valid time, place, and manner regulation. Plaintiff contends that a statute will pass constitutional muster as a time, place, and manner regulation if it is content neutral, is narrowly tailored to serve a significant government interest, and leaves open ample alternative channels of communication. In addition, plaintiff contends that the government must overcome the heavy presumption against the constitutionality of a prior restraint by establishing that the statute and regulations narrowly constrain the substantial discretion of licensing officials with narrow, objective, and definite standards, and that tight procedural requirements constrain the processing of permits. Defendant replies that the prior restraint analysis is appropriate where a regulation restricts speech directly based on its content, directly regulates expression, or vests unbridled expression in a government official to "permit" speech and, the OMGA does not qualify under any of these criteria, but is properly analyzed as a content neutral time place, and manner regulation. Plaintiff replies that defendant misses the mark in its discussion of prior restraint. Plaintiff contends that its constitutional right to gather is equal to those rights discussed by the Supreme Court in *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 223-27 (1990) (plurality opinion). Subsequent to briefing and argument, defendant notified the court by letter of the Supreme Court's decision in *Thomas v. Chicago Park Dist.*,

__ U.S. __, 122 S. Ct. 775 (2002). Plaintiff responded to defendant-intervenor's letter and addressed *Thomas*.

The Ninth Circuit has stated that, "A prior restraint exists when the enjoyment of protected expression is contingent upon the approval of government officials." *Baby Tam & Co. v. City of Las Vegas,* 154 F.3d 1097, 1100 (9th Cir.1998). The rights of assembly and association are fundamental freedoms protected by the First Amendment. *See Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (per curiam); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992) [ordinance requiring permit and fee before authorizing public speaking, parades, or assemblies "is a prior restraint on speech"]; *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969) [same]. The court has found, *supra*, that the OMGA bears a close enough nexus to expression or to conduct commonly associated with expression, to pose substantial risks of censorship. It seems clear that the OMGA acts as a prior restraint since it requires a permit before an assembly of more than 3,000 for more than 24 hours may take place. There is a "'heavy presumption'" against the constitutionality of a prior restraint. *Forsyth County*, 505 U.S. at 130 (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)).

The government may impose reasonable time, place, or manner regulations that incidentally burden speech if the regulations are content neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels for communication of the information. *Ward v. Rock Against Racism*, 491 U.S. 789, 791, *reh'g*

denied, 492 U.S. 937 (1989). Other than to point out the state's burden to show that the OMGA is a time, place, and manner regulation, plaintiff does not address the individual requirements.

In determining whether a regulation is content neutral,

> The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed content neutral, even if it has an incidental effect on some speakers or messages but not others. Government regulation of expressive activity is content neutral so long as it is "*justified* without reference to the content of the regulated speech."

Id. at 791-92 (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); other citations omitted). It is clear from a review of the OMGA that it is not directed at the content of any message or purpose of assembly; there is no regulation of assembly of persons for more than twenty-four hours which is based on the viewpoint or subject matter of the gathering. The OMGA provides that upon application, where the organizer demonstrates compliance or the ability to comply with the health and safety rules governing outdoor mass gatherings, the county governing

body "shall" issue a permit. ORS 433.750(1) (2001). As stated in the OMGA, it was enacted to establish reasonable health and safety rules to regulate uncontrolled outdoor gatherings of persons for extended periods of time. ORS 433.740 (2001). The OMGA serves purposes unrelated to the content of any message of the gathering, and its regulation of outdoor mass gatherings is justified without reference to the content of the gathering. *See Ward,* 491 U.S. at 791-92. The court finds that the OMGA is content-neutral and satisfies the first prong of the place and manner test.

It is clear that the state's interest in health and safety, as expressed in the OMGA, *see* ORS 433.740 (2001), is a substantial interest which justifies a content-neutral restriction on assembly and speech. Plaintiff does not contend otherwise. The regulations provide detailed requirements addressing health and safety aspects of large assemblies of persons for more than twenty-four hours. OAR 333-039-0005 et seq. It appears the regulation of outdoor mass gatherings is narrowly tailored to achieve the state's interest, and plaintiff does not argue otherwise.

Further, the OMGA leaves open ample alternative channels for assembly and communication of ideas, satisfying the third prong. Plaintiff does not argue otherwise. The OMGA applies only to gatherings of 3,000 or more persons and for periods of more than twenty-four hours. Thus, a gathering need not apply for a permit and satisfy the requirements of the OMGA, if persons less than 3,000 assemble for more than twenty-four hours, or, if a gathering of 3,000 is anticipated, they assemble for less than twenty-four hours.

Appendix B

Plaintiff's challenge focuses on its argument that provisions of the OMGA place unbridled discretion in the county to deny a permit. Plaintiff's contentions will be addressed by the court in considering plaintiff's claims as to the OMGA. Unless it is demonstrated that the OMGA allows uncontrolled discretion in denying permits for mass gatherings, it appears that the OMGA is a content neutral time, place, and manner regulation.

In count one of its third amended complaint, plaintiff alleges that the OMGA permit scheme is invalid on its face because it contains certain defects which renders it a prior restraint on plaintiff's rights of assembly, association, religion, and speech under the First and Fourteenth Amendments, for the reasons that: it fails to set a fixed deadline for action on plaintiff s application for a permit in violation of the First and Fourteenth Amendments; it fails to establish objective criteria to guide defendants' decision regarding how much, for what, or whether to charge plaintiff a permit fee to exercise constitutional rights; it lacks assurance of prompt judicial review of defendants' denial or revocation of plaintiff's permit; it lacks sufficient safeguards against arbitrary action or de facto censorship by defendants against plaintiff's permit based on the content of plaintiff's religious gathering; and it allows defendants to annually change, alter, and modify plaintiff's rights of assembly, association, religion, and speech by imposing different or new conditions on plaintiff's permit based on the content of previous gatherings.

Appendix B

Count one: Plaintiff's claims that the OMGA fails to establish objective criteria to guide defendants' decision regarding how much, for what, or whether to charge plaintiff a permit fee to exercise constitutional rights; the OMGA lacks sufficient safeguards against arbitrary action or de facto censorship based on the content of plaintiff's religious gathering; and the OMGA allows defendants to annually change, alter, and modify plaintiff's rights of assembly, association, religion, and speech by imposing different or new conditions on plaintiff's permit based on the content of the previous gatherings

Plaintiffs claims that the OMGA fails to establish objective criteria to guide defendants' decision regarding how much, for what, or whether to charge plaintiff a permit fee to exercise constitutional rights. Defendant-intervenor contends that the OMGA need not establish strict procedures for assessing or waiving the administrative fee, which is required of a prior restraint, citing *Forsyth County*. In a footnote, defendant-intervenor asserts that, even if strict scrutiny applies, the fee assessment and waiver procedures are specific and should pass constitutional muster. Defendant-intervenor contends that the OMGA provides standards and safeguards appropriate to its scope and purpose. Plaintiff contends that Jackson County defendants' examination of its permit application was based on content--the political and social views of the group and whether the neighbors and defendant Sheriff liked the group and its views.

The government may impose a permit requirement, but a permit scheme "may not delegate overly broad licensing discretion to a government official." *Forsyth County v.*

Nationalist Movement, 505 U.S. 123, 130 (1992) (citing *Freedman v. Maryland*, 380 U.S. 51 (1965)). A permit scheme controlling the time, place and manner of speech may not be based on the content of the message, must be narrowly tailored to serve a significant government purpose, and must leave open ample alternatives for communication. *Forsyth County*, 505 U.S. at 130. However, "A government regulation that allows arbitrary application is 'inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view.'" *Id.* at 130-31 (quoting *Heffron v. International Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981)); *see American Jewish Cong. v. City of Beverly Hills*, 90 F.3d 379, 385 (9th Cir. 1996). The *Forsyth County* Court went on: "To curtail that risk, 'a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license' must contain narrow, objective, and definite standards to guide the licensing authority." 505 U.S. at 131 (quoting *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969)). Thus, "If the permit scheme 'involves appraisal of facts, the exercise of judgment, and the formation of an opinion,' by the licensing authority, 'the danger of censorship and of abridgment of our precious First Amendment freedoms is too great' to be permitted." *Forsyth County*, 505 U.S. at 131 (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975)).

The Court in *Forsyth County*, 505 U.S. 123, considered the issue whether the free speech guarantees of the First and Fourteenth Amendments were violated by an assembly and

parade ordinance that permitted government administration to vary the fee for assembling or parading to reflect the cost of maintaining public order. The ordinance at issue provided that the county administrator was empowered to adjust the amount paid to reflect administrative and security expenses. The Court found that the regulation and its interpretation and implementation by the county granted the administrator uncontrolled discretion to assess a permit fee. There were no narrowly drawn, reasonable, and definite standards in the ordinance or in the county's established practice to guide the administrator's decision. The Court found that the decision as to how much to charge or whether to charge at all was "left to the whim of the administrator." *Id.* at 132. There was nothing in the ordinance or its construction which prevented the administrator from encouraging some views and discouraging other views through the arbitrary application of fees, which is prohibited by the First Amendment. *Id.* at 131-37.

The government may charge fees to meet expenses incident to the administration of a permit scheme and to maintain public order, but the fees may not serve as revenue taxes. *Center for Auto Safety. Inc. v. Athey*, 37 F.3d 139, 144-45 (4th Cir. 1994), *cert. denied,* 514 U.S. 1036 (1995); *Coalition for the Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301, 1323-24 & n.16 (11th Cir. 2000) (and cases cited); *see Baldwin v. Redwood City*, 540 F.2d 1360, 1372 & nn. 32 & 33 (9th Cir. 1976), *cert. denied,* 431 U.S. 913 (1977). Nominal fees used to defray the cost of policing the activities in question are allowed, subject to important limits, as set forth in *Forsyth County. Athey,* 37

F.3d at 144-45. When fees are statutorily set, officials cannot manipulate the fee discriminatorily in order to censor or limit an applicant's First Amendment rights. A statute that affords officials no discretion in imposing the appropriate fee is valid. *Id.* at 145.

The OMGA provides in pertinent part:

> (6) A county governing body may charge permit applicants a fee reasonably calculated to reimburse the county for its reasonable and necessary costs in receiving, processing and reviewing applications for permits to hold outdoor mass gatherings. However, a fee authorized by this subsection shall not exceed $5,000 and shall not be charged when the governing body finds by a preponderance of the evidence presented to the governing body, that the applicant is unable to reimburse the governing body.

ORS 433.750(6) (2001). The state's administrative regulations do not address the assessment of a permit fee. OAR 333-039-005 to 333-039-055.

Unlike the situation in *Forsyth County,* where the county administrator was authorized by the ordinance and the county's construction of the ordinance to decide whether a permit fee would include any or all of the county's administrative and security costs, the OMGA provides that the county may charge a permit fee and, if charged, the fee is to be based upon the county's reasonable and necessary costs "in receiving, processing and reviewing applications," in an

amount reasonably calculated to reimburse the county for such costs, and in an amount not to exceed $5,000.00. ORS 433.750(6). The statute contemplates a fee which will reimburse the county for its reasonable and necessary costs incurred in receiving, processing, and reviewing a mass gathering permit application, and which does not exceed $5,000.00. The court finds that, on its face, the OMGA's provision for a permit fee contains narrow, objective and definite standards to guide the county in assessing a permit fee. Plaintiff's contentions rely on actions of Jackson County defendants in assessing the permit fee for 1996. Those arguments are better addressed in its "as applied" challenge to the OMGA, which is not at issue on these cross-motions for summary judgment.

Plaintiff claims that the OMGA lacks sufficient safeguards against arbitrary action or de facto censorship based on the content of plaintiff's religious gathering, and that the OMGA allows defendants to annually change, alter, and modify plaintiff's rights of assembly, association, religion, and speech by imposing different or new conditions on plaintiff's permit based on the content of the previous gatherings.

A permit scheme "may not delegate overly broad licensing discretion to a government official." *Forsyth County*, 505 U.S. at 130. The court has found that the OMGA is content neutral. A review of the OMGA shows that, on its face, the provisions of the OMGA contain sufficient safeguards to guard against arbitrary action and annual changes based on the content of gatherings. The OMGA applies whenever an outdoor mass gathering, as defined in

the statute, will take place in any three-month period. Under the OMGA, a mass gathering permit will be granted if the applicant shows compliance with the health and safety requirements adopted by the Health Division which are regulated "according to the anticipated crowd." ORS 433.750(1). Since each mass gathering may differ depending on the number of persons anticipated to gather, it is appropriate to require an applicant to demonstrate compliance with permit requirements each time an outdoor mass gathering takes place. *See cf. City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 759-60 (1988).

Again, plaintiff's arguments as to these claims address the actions of Jackson County defendants in issuing plaintiff's mass gathering permit in 1996. Plaintiff's arguments in this regard are better addressed in its "as applied" challenge to the OMGA, which is not presently before the court.

Count one: Plaintiff's claims that the OMGA fails to set a fixed deadline for action on plaintiff's application for a permit; and the OMGA lacks assurance of prompt judicial review of defendants' denial or revocation of plaintiff's permit

Plaintiff contends that, under *Freedman* and *FW/PBS*, the OMGA fails to provide procedural safeguards of a fixed deadline for decision on an application, and assurance of prompt judicial review upon denial or revocation of a permit. Defendant-intervenor contends that the requirements of prompt judicial review and other procedural safeguards, which are applicable to prior restraints, are inappropriate in this case. Defendant-intervenor relies on *Thomas v. Chicago*

Park Dist., __ U.S. __, 122 S. Ct. 775 (2002), where the Supreme Court stated that it has never held that a content neutral permit scheme regulating speech in a public forum must adhere to the procedural safeguards set forth in *Freedman v. Maryland*, 380 U.S. 51 (1965) and *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990) (plurality opinion). Plaintiff contends that expeditious and unbiased review by the governing body of a permit application is needed and that, if denied, the applicant has available judicial review to prevent abuse. Plaintiff contends that the Court in *Thomas* reiterated that the preliminary inquiry is whether the licensing scheme allows for unduly broad discretion on the part of government officials, thereby risking censorship of disfavored speech.

The Supreme Court in *Freedman*, 380 U.S. 51, set forth the following procedural safeguards as necessary to ensure expeditious decision making by a motion picture censorship board:

> (1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court.

FW/PBS, 493 U.S. at 227 (citing *Freedman*, 380 U.S. at 58-60).

Appendix B

The Court in *FW/PBS*, 493 U.S. at 228, applied the *Freedman* safeguards to a licensing ordinance regulating sexually oriented businesses, finding that the licensor must make the decision whether to issue the license within a specified and reasonable time period, and there must exist the possibility for prompt judicial review if the license was erroneously denied.

In *Thomas*, __ U.S. __, 122 S. Ct. 775, the Court addressed whether a municipal park ordinance which required persons to obtain a permit before conducting large-scale events in the park, required the procedural safeguards set forth in *Freedman*. The *Thomas* Court found that *Freedman* was inapposite because the licensing scheme at issue was a content neutral time, place, and manner regulation and not subject matter censorship as was at issue in *Freedman* and *FW/PBS*. *Id.* at 780 & n.2. However, the Court went on to state that,

> Of course even content-neutral time, place, and manner restrictions can be applied in such a manner as to stifle free expression. Where the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk that he will favor or disfavor speech based on its content.

Id. at 780 (citing *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131 (1992)). Because of such a risk, the Court stated that it has required that "a time, place, and manner regulation contain adequate standards to guide the official's decision and render it subject to effective judicial review."

Thomas, __ U.S. at __, 122 S. Ct. at 780 (citing *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951)).

The court has found, *supra*, that the OMGA on its face does not target any particular message or purpose of assembly, and is content neutral. Unlike the decisions which have applied procedural safeguards to licensing schemes which are directed at and restrict a category of speech, the danger of censorship present in those cases is not present in the OMGA. On the face of the OMGA, the content of any message or assembly is not considered in determining whether an outdoor mass gathering permit should be granted or denied, *see supra*. Accordingly, the procedural safeguards set forth in *Freedman* are not necessary in this context.

However, as the Court stated in *Thomas*, a content neutral time, place, and manner regulation may be applied so as to stifle expression. In support of its claims, plaintiff refers to actions and inaction by Jackson County defendants. Plaintiff may address such arguments in its "as applied" challenge, which is not now before the court.

Conclusion as to count one

Based on the foregoing, the court concludes that the OMGA is a content neutral time, place, and manner regulation, and is not an invalid prior restraint. For the reasons stated, the court finds that the OMGA is not unconstitutional on its face on the grounds raised by plaintiff in count one. Defendant-intervenor's motion for summary judgment as to count one is granted, and plaintiff's motion for summary judgment as to count one is denied.

Appendix B

Counts two and three

Counts two and three are alleged as alternative counts "only if this court refuses to enjoin the statute," (Third Am. Compl. at 10).

Count two: Plaintiff's claim that the OMGA permit process allows defendants to annually chance the conditions of plaintiff's permit

In its third amended complaint, plaintiff claims that the OMGA permit process allows defendants to annually change the conditions of plaintiff's permit without compelling governmental justification or need, which is a de facto content based restriction in violation of its rights of assembly, association, religion, and speech. Plaintiff contends on summary judgment that the permit scheme allows annual changes, alterations, and modifications of its permit by imposition of different or new conditions based on the content of previous annual gatherings. Plaintiff relies on *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750 (1988), in support.

In *Plain Dealer,* the Court addressed an ordinance which required annual application for newsrack licenses. The Court noted that the system at issue was the sort in which a licensee must apply for multiple licenses over time or periodically renew a license, and found that, when applied to speech, there existed a risk that the licensor could measure the probable content of the text of the speech by speech already uttered. For this reason, and the reason that the licensing system was

directed at the circulation of newspapers, the Court allowed a facial challenge to the licensing system.

As discussed previously, an organizer of an outdoor mass gathering, as defined in the statute, must apply for a permit under the OMGA whenever such a gathering will take place in any three-month period. The OMGA is not a permit system which mandates multiple or periodic licensing. It appears from plaintiff's allegations in its complaint and the record on motions for summary judgment that plaintiff held its event annually until 1996. Thus, it is not the mandate of the OMGA which requires annual permitting by plaintiff, but the fact that plaintiff holds an outdoor mass gathering each year which requires a permit under the OMGA. Under the OMGA, a mass gathering permit "shall" be granted if the applicant demonstrates compliance with the health and safety requirements adopted by the Health Division which are regulated "according to the anticipated crowd." ORS 433.750(1). Since each mass gathering will differ depending on the number of persons anticipated to gather, it is appropriate to require an applicant to demonstrate compliance with permit requirements each time an outdoor mass gathering takes place.

Of course, if plaintiff shows that defendants uses the content of prior year's mass gathering in deciding to grant of deny a permit, plaintiff can address defendants' actions in its "as applied" challenge to the OMGA. In its arguments made in the instant cross-motions for summary judgment, plaintiff refers to certain actions of defendant Jackson County in support of its motion and in opposition to defendant's motion. Those arguments can be addressed in plaintiff's

"as applied" challenge, which is not presently before the court.

The court concludes that the OMGA is not facially invalid for the reason that the permit scheme allows defendants to annually change the conditions of plaintiff's permit. Defendant-intervenor's motion for summary judgment as to count two is granted, and plaintiff's motion for summary judgment as to count two is denied.

Count three: Plaintiff's claim that the indigency determination process in the OMGA lacks sufficient standards

Plaintiff claims in its third amended complaint that the indigency determination process in the OMGA, as written and applied, lacks sufficient safeguards in that it lacks narrowly tailored, objective standards to guide defendants' determination; it allows defendants unfettered discretion to decide whether plaintiff has the ability to pay the permit application fee; it allows defendants unfettered discretion to chose the forum for presenting evidence regarding plaintiff's inability to pay; and it lacks objective standards which would allow a meaningful judicial review of defendants' decision regarding plaintiff's inability to pay the permit application fee. Plaintiff does not specifically address count three in its motion for summary judgment or its response to defendant-intervenor's motion for summary judgment.

Appendix B

The OMGA provides in pertinent part:

> (6) A county governing body may charge permit applicants a fee. . . . However, a fee authorized by this subsection shall not exceed $5,000 and shall not be charged when the governing body finds, by a preponderance of the evidence presented to the governing body, that the applicant is unable to reimburse the governing body.

ORS 433.750(6) (2001). The statute clearly contemplates that the county is to make its determination of plaintiff's ability to reimburse the county for its reasonable and necessary costs in receiving, processing, and reviewing an application for a permit based upon a preponderance of the evidence presented to it. The court finds that this provision, on its face, contains sufficient objective standards to guide a county's determination and does not allow unfettered discretion by the county in making its indigency determination.

The OMGA also provides that a public hearing "shall" be held "on the issue of compliance with this section [, ORS 433.750]." ORS 433.750(4) (2001). Section 433.750 provides for the procedure for issuance of a permit, the permit fee and limitation on the permit fee amount, including the subsection challenged relating to indigency determinations. However, the "issue of compliance" with ORS 433.750 appears to refer to the requirement in the section that an applicant demonstrate compliance with, or the ability to comply with, the health and safety rules regulated according to the crowd anticipated adopted by the Health Division. *See* ORS 433.750(1) & 433.750(1)(f); OAR 333-039-0005 through 333-039-0055.

The OMGA also provides that "Any decision of a county governing body on an application for a permit to hold an outdoor mass gathering may be appealed to a circuit court for the county as provided in ORS 34.020 to 34.100." ORS 433.750(5) (2001). It seems clear from the language of the statute that a county's determination of ability to pay is a decision by the county on an application for a permit which may be appealed to circuit court.

Any challenge to Jackson County defendants' actions or inactions relating to an indigency determination can be addressed in plaintiff's "as applied" challenge to the OMGA, which is not at issue at the present time.

For the foregoing reasons, the court concludes that the OMGA is not facially invalid for the reason that the indigency determination in the OMGA lacks sufficient safeguards for the reasons advanced by plaintiff. Defendant-intervenor's motion for summary judgment as to count three is granted, and plaintiff's motion for summary judgment as to count three is denied.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR PANEL REHEARING EN BANC FILED JULY 21, 2004; PUBLISHED DISSENTING OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED MARCH 24, 2005

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 02-35560.

March 24, 2005.

SOUTHERN OREGON BARTER FAIR,

Plaintiff-Appellant,

v.

JACKSON COUNTY, OREGON; Jackson County Board of Commissioners; Jackson County Sheriff's Department; Ric Holt; Jack Walker; Sue Kupillas; Robert Kennedy,

Defendants,

and

State of Oregon,

Defendant-intervenor-Appellee.

Appendix C

Before: ALARCÓN, RAWLINSON, and BYBEE, Circuit Judges.

ORDER

Judges Rawlinson and Bybee have voted to deny the petition for rehearing en banc and Judge Alarcón so recommends.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc, and the matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R.App. P. 35.

The petition for panel rehearing en banc, filed July 21, 2004, is **DENIED.**

BERZON, Circuit Judge, with whom PREGERSON, REINHARDT, KOZINSKI, WARDLAW, W. FLETCHER, and PAEZ, Circuit Judges, join, dissenting from denial of rehearing en banc:

I respectfully dissent from the order denying rehearing en banc. The panel holds that a statute governing the issuance of permits for the conduct of events involving First Amendment-protected activity need not contain *any* deadline by which the permitting authorities will decide whether or not the permit will be granted. The result—as the facts underlying this case demonstrate—is to accord governmental authorities unbridled discretion, through official footdragging, effectively to veto the holding of an event

protected by the First Amendment. The panel's decision is in square conflict with the very Supreme Court precedent upon which it relies, and will permit administrators to impede parties seeking to engage in First Amendment-protected activity on private property. As the case is both an important one and one in which the panel has seriously misread Supreme Court law, we should have heard it en banc.

1. My central quarrel with the panel's decision is its fundamental misreading of *Thomas v. Chicago Park District,* 534 U.S. 316, 122 S.Ct. 775, 151 L.Ed.2d 783 (2002). The panel rests on *Thomas* as the pillar of its reasoning. *S. Or. Barter Fair v. Jackson County,* 372 F.3d 1128, 1137-39 (9th Cir.2004). In fact, *Thomas* embraced *two* holdings, not one: The first, upon which the panel relies, is that the specific set of prophylactic protections created in *Freedman v. Maryland,* 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965),[1] for *content-based* censorship schemes does not apply to content-neutral permitting schemes. *Thomas,* 534 U.S. at

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1. In the context of content-based censorship schemes, the *Freedman* set of protections requires that:

> (1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court.

FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 227, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990) (plurality opinion) (citing *Freedman,* 380 U.S. at 58- 60, 85 S.Ct. 734).

322-23, 122 S.Ct. 775. The second, construed by the panel as not applying to time-limits issues, is that *content-neutral* schemes must "contain adequate standards to guide the official's decision and render it subject to effective judicial review," so as to avoid their application "in such a manner as to stifle free expression." *Id.* at 323, 122 S.Ct. 775. This case concerns only the second holding. The panel's decision mangles its application.

In *Thomas,* the plaintiff requested "that the park district should in every case in which it denies a permit be required to seek *judicial* review of its own action." *Thomas v. Chi. Park Dist.,* 227 F.3d 921, 926 (7th Cir.2000) (emphasis added), *aff'd,* 534 U.S. 316, 122 S.Ct. 775, 151 L.Ed.2d 783. The Court ruled that although such a requirement does apply when the government seeks to ban speech on the basis that it comes within the exceedingly narrow set of circumstances in which prior restraints on speech based on content are permitted, no such special prophylactic rule applies to administrative decisions regarding the issuance of permits under otherwise valid schemes that do not take into account the content of any intended speech. *Thomas,* 534 U.S. at 323, 122 S.Ct. 775.

Here, the question that deserves en banc consideration does *not* concern judicial review,[2] but the timeliness of an *initial* administrative decision on a permit application for speech-related activity. The Oregon Mass Gathering Act

2. The panel also rejected the contention that the Oregon Mass Gathering Act is invalid because it lacks a provision for prompt judicial review of permit application denials. *S. Or. Barter Fair,* 372 F.3d at 1138. I have no quarrel with this holding.

("OMGA"), Or. Rev. Stat. §§ 433.735 *et seq.*, requires that citizens planning large events on private property must demonstrate in their application for a permit the ability to comply with a complex set of logistical requirements. Complying with those requirements can involve significant advance planning, purchasing, hiring, and installment of equipment. Yet, the OMGA does not provide for any time limit within which the permitting authorities must respond to a permit request. In the absence of any such limitation, the permitting officials have broad discretion to determine the time interval left to plaintiffs to plan their event at the requested site or, if the permit is denied, make alternate plans. Answering the question whether such an open-ended statute governing speech activity is permissible requires application of *Thomas's second* holding: whether the OMGA "contain[s] adequate standards to guides the official's discretion and render it subject to effective judicial review." *Id.*

Without careful attention, it is easy to read the *Thomas* and *Southern Oregon Barter Fair* requests as one and the same: for a time limit on review of submitted applications. The panel fell prey to this mistake, seriously misunderstanding the difference between *Thomas's* two, distinct holdings. *See S. Or. Barter Fair,* 372 F.3d at 1138 ("The Act need not include *either* a deadline for consideration by the governing body *or* a provision for prompt judicial review. *See Thomas,* 534 U.S. at 322-23, 122 S.Ct. 775." (emphasis added)).

Thomas did not decide that a content-neutral time place, and manner regulation need not include any deadline for administrative review; the ordinance in *Thomas,* indeed, had

such a deadline—twenty-eight days. *See* 534 U.S. at 318, 122 S.Ct. 775. Instead, the Court decided only that two *Freedman* requirements—a deadline for *judicial* review of a *censor's* decision, and the requirement that the government must initiate litigation—do not apply to content-neutral schemes. *See id.* at 321, 122 S.Ct. 775 ("Petitioners contend that the Park District, like the Board of Censors in *Freedman,* must initiate litigation every time it denies a permit and that the ordinance must specify a deadline for judicial review of a challenge to a permit denial. We reject those contentions."). Furthermore, in deciding whether the Chicago Park District regulatory scheme contained "adequate standards to guide [an] official's discretion and render it subject to effective judicial review," *id.* at 323, 122 S.Ct. 775, the Court specifically pointed to the deadline for administrative review—mandating that "the Park District must process applications within 28 days," *id.* at 324, 122 S.Ct. 775—as among the reasons why the Chicago Park District's scheme does not give "the licensing official . . . unduly broad discretion in determining whether to grant or deny a permit, [creating] a risk that he will favor or disfavor speech based on its content." *Id.* at 323, 122 S.Ct. 775.

2. That the OMGA includes onerous and time-consuming requirements[3] for sponsors of large-scale events, but does not contain a deadline for administrative review,

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3. Rules issued by Oregon's Department of Human Services in accordance with the OMGA demand a permit applicant to meet standards governing water supply, drainage, sewerage facilities, refuse storage and disposal, food and sanitary food service, fire protection, security personnel, and traffic. *See* Or. Admin. R. 333-039-0005 *et seq.*

creates the very "risk that [a licensing official] will favor or disfavor speech based on its content," *id.*, that *Thomas* posits for imprecise statutory and regulatory permitting schemes. In particular, the OMGA allows administrators to sit on applications until the time before an event is so limited that an applicant will be unable to meet the significant statutory requirements for fire protection, water supply, and so on.

In this case, that risk was well illustrated by the processing of the Fair's OMGA application for its 1996 event. The Fair first requested an application in January 1996. The defendants did not immediately provide an application, explaining that they were in the process of drafting a new ordinance that would require a new application. In April 1996, defendants gave the Fair an application that was identical to the one they had provided the year before. Plaintiff immediately submitted an application, but the defendants did not schedule a hearing on the application until July 22, 1996, more than three months after the Fair submitted the permit and more than five months after the Fair had first applied for a permit application. At the July 22 hearing, one defendant-commissioner, expressing his personal disapproval of the lifestyle, beliefs, and practices of the people who would attend the proposed Fair, argued that the Fair's proposed event had no merit and should not be allowed to proceed. Defendants ultimately reached no decision on the application at that hearing, and rescheduled the hearing for more than one month later on August 27, 1996. Finally, more than eight months after the Fair first requested an application, defendants approved the Fair's application on August 29, 1996.

As the panel noted, "the uncertainty inherent in the 1996 application process was one of the Fair's primary reasons for bringing suit." *S. Or. Barter Fair,* 372 F.3d at 1138. This background obviously provided a strong basis for the Fair's as-applied challenge to the OMGA, which it ultimately won, following a jury trial. More importantly, however, this history demonstrates well that the OMGA's lack of a deadline for administrative review facilitates content-based discrimination. The potential for abuse is precisely why the line of cases culminating in *Thomas* requires that a time, place, and manner restriction contain adequate standards to guide an official's decision and render it subject to effective judicial review.

The availability of injunctive relief, mandamus, or damages under 42 U.S.C. § 1983 is not a substitute for specificity in the statute itself. A central premise of *Thomas* and its predecessors is that case-by-case adjudication is *not* a substitute for "'narrowly drawn, reasonable and definite standards,'" *Thomas,* 534 U.S. at 324, 122 S.Ct. 775 (quoting *Forsyth County v. Nationalist Movement,* 505 U.S. 123, 133, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992)), that guide a licensor's determination. Post-hoc relief is not a fully adequate equivalent of the right to speak when and where one chooses to do so. And obtaining injunctive or mandamus relief without clear statutory standards requires proof of illicit motive, difficult under any circumstances and particularly difficult when time is short and full development of the facts through discovery unlikely.

In short, relegating citizens applying for permits for speech-related activity to as-applied challenges is decidedly

not the law. Instead, the standards governing the issuance of such permits—*including,* as *Thomas* indicates, standards of timeliness—must be spelled out in the ordinance itself. *Id.* at 324-25, 122 S.Ct. 775.

There is no basis for treating unbridled discretion with respect to timing of administrative response to a permit application differently from other kinds of administrative discretion with respect to the issuance of permits, and the panel suggests none. Timing is likely to be of the essence when planning a large event of the kind covered by the OMGA. Administrative delays can interfere not only with a party's ability to comply with the OMGA's complicated logistical requirements, but also stymy effective judicial review. Here, for example, the defendants kept, effectively, stringing the Fair along, making it difficult to obtain judicial review before rather than after the scheduled date of the event.

In addition, the panel erred by not giving particular attention to the need for safeguards against unbridled discretion in the context of this non-traditional time, place, and manner regulation, governing the use of *private* property. Although the government certainly has valid interests in the health and safety of the many people participating in and affected by large events such as the Southern Oregon Barter Fair, those interests are different from, and to some degree narrower than, those at stake when the government is property manager of a public forum. *See Cox v. New Hampshire,* 312 U.S. 569, 574, 61 S.Ct. 762, 85 L.Ed. 1049 (1941) ("The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of *public highways* has never been regarded as

inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend." (emphasis added)). In our own homes and on our own land, our right to have political meetings and other speech-related events without asking the government prior permission is ordinarily absolute. The OMGA is permissible at all only because it covers extremely large gatherings, likely to create sanitary and logistic problems if not well run. In this context, the potential for infringement on core First Amendment activities is at its greatest.

3. Finally, I note that fear of creating an inter-circuit conflict is no reason to decide this case contrary to *Thomas*. Avoiding a circuit conflict is an important consideration when issues are close. When, as here, there is clear statutory or case law dictating the result, we should decide the case correctly for ourselves. *Cf. Costa v. Desert Palace, Inc.*, 299 F.3d 838, 851-54 (9th Cir.2002) (en banc) (declining to follow the approach generally used by other circuits with regard to proof of Title VII mixed motive cases, when other circuits had failed to consider superseding statutory language), *unanimously aff'd*, 539 U.S. 90, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003); *United States v. Gaudin*, 28 F.3d 943, 948-51 (9th Cir.1994) (en banc) (holding that the materiality of false statements to the government is a question of fact, notwithstanding the contrary view of the eleven other circuits that had considered the issue), *unanimously aff'd*, 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995).

In this instance, some of the cases in the other circuits that consider seemingly similar questions rely on considerations not here applicable. To the extent others of

those cases, like the panel in this case, read *Thomas* as having held that there is no longer any need for clear timeliness standards for the consideration of content-neutral permits affecting speech activities, those cases are wrong, and we should not follow them.

The First Circuit's decision in *New England Regional Council of Carpenters v. Kinton,* 284 F.3d 9 (1st Cir.2002), for example, involves circumstances sufficiently different from those in this case that there would be no conflict were we to hold the OMGA facially invalid for failure to specify any time limit for consideration of permit applications. In *New England Regional Council,* the First Circuit considered a leafletting permit scheme under which "the automatic issuance of permits negate[d][the] potential concern . . . that officials could effectively deny permits by dragging their feet." *Id.* at 25 n. 8. More importantly, the plaintiff's *as-applied* challenge did not specifically attack the lack of an administrative review deadline.

The Tenth Circuit, in *Utah Animal Rights Coalition v. Salt Lake City Corp.,* 371 F.3d 1248 (10th Cir.2004), erred as the panel did—by reading *Thomas* as holding that permitting ordinances need not contain time limits when in fact *Thomas* did not so state. *See id.* at 1259. In the course of so ruling, *Utah Animal Rights Coalition* suggested that there is no need for time limits in content-neutral permitting ordinances, as they do not restrain speech during the period of any delay. This analysis entirely misses the reason given in *Thomas* for requiring "[n]arrowly drawn, reasonable and definite standards," *id.* at 324, 122 S.Ct. 775—to constrain administrative discretion that can serve as a cover for content-

based distinctions and result in preventing speech for lack of adequate advance notice. Moreover, the analysis turned in part on the plaintiff's failure in that case to argue that the lack of a deadline for administrative review violated *Thomas's* second holding. *Id.* at 1260. The plaintiff apparently argued that an administrative review deadline was required under only *Freedman v. Maryland,* not *Thomas,* as it suffered from "confusion on this point of law."

Id. at 1259. Finally, as in *Granite State Outdoor Advertising, Inc. v. City of St. Petersburg,* 348 F.3d 1278 (11th Cir.2003), *cert. denied,* 541 U.S. 1086, 124 S.Ct. 2816, 159 L.Ed.2d 247 (2004), and *Griffin v. Secretary of Veterans Affairs,* 288 F.3d 1309 (Fed.Cir.2002), *Utah Animal Rights Coalition* disregarded *Thomas's* review of the Chicago Park District permitting ordinance, failing to note that there *was* an administrative review deadline and that the Court considered that deadline in concluding that the standards in the permitting ordinance were sufficiently specific to survive a facial challenge.[4]

In sum, because the panel misread binding Supreme Court precedent by issuing a decision that will allow unbridled administrative discretion and the unconstitutional infringement of First Amendment-protected free speech rights, I respectfully dissent.

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4. *Granite State Outdoor Advertising* is particularly worrisome, as the court explicitly decided to await evidence of a pattern of abuse before deciding that the challenged ordinance without a time limit for administrative review was constitutionally inadequate. 348 F.3d at 1282.

APPENDIX D — OREGON MASS GATHERING ACT

REGULATION OF OUTDOOR MASS GATHERINGS

433.735. Definitions for ORS 433.735 to 433.770.

As used in ORS 433.735 to 433.770 and 433.990 (6):

(1) "Outdoor mass gathering," unless otherwise defined by county ordinance, means an actual or reasonably anticipated assembly of more than 3,000 persons which continues or can reasonably be expected to continue for more than 24 consecutive hours but less than 120 hours within any three-month period and which is held primarily in open spaces and not in any permanent structure.

(2) "Organizer" includes any person who holds, stages or sponsors an outdoor mass gathering and the owner, lessee or possessor of the real property upon which the outdoor mass gathering is to take place.

(3) "Permanent structure" includes a stadium, an arena, an auditorium, a coliseum, a fairgrounds or other similar established places for assemblies.

(4) "Temporary structure" includes tents, trailers, chemical toilet facilities and other structures customarily erected or sited for temporary use.

[1971, c.597, § 1a; 1981, c.82 § 3; 1985, c.758 § 1; 2001, c.104, § 157]

Appendix D

433.740. Policy.

The Legislative Assembly finds that the uncontrolled outdoor gatherings of large groups of persons for extended periods of time have necessitated a need for the establishment of reasonable health and safety rules to regulate such outdoor mass gatherings.

[1971, c. 597, § 1]

433.745. Outdoor mass gathering without permit prohibited.

(1) No organizer shall hold, conduct, advertise or otherwise promote an outdoor mass gathering or allow an outdoor mass gathering to be held on real property the organizer owns, leases or possesses unless a permit to hold such outdoor mass gathering has been issued by the county governing body in which the outdoor mass gathering is to take place.

(2) A permit issued under this section does not entitle the organizer to make any permanent physical alterations to or on the real property which is the site of the outdoor mass gathering.

[1971, c.597, § 2; 1985, c.758, § 3]

Appendix D

433.750. Permit application; procedure for issuance of permit; fee.

(1) The governing body of a county in which an outdoor mass gathering is to take place shall issue a permit upon application when the organizer demonstrates compliance with or the ability to comply with the health and safety rules governing outdoor mass gatherings to be regulated according to the anticipated crowd and adopted by the Department of Human Services. The application shall include all of the following:

(a) Name and address of the applicant.

(b) Legal description of the place of the proposed gathering.

(c) Date of the proposed gathering.

(d) Estimated attendance at the proposed gathering.

(e) Nature of the proposed gathering.

(f) Such other appropriate information as the county governing body may require in order to insure compliance with rules of the Department of Human Services.

(2) Notice of the application shall be sent by the county governing body to the county sheriff or county chief law enforcement officer, the county health officer and the chief of the fire district in which the gathering is to be held.

(3) Each officer receiving notice of the application under subsection (2) of this section who wishes to comment on the application shall submit such comment in writing to the county governing body not later than the hearing date. The comment may include recommendations related to the official functions of the officer as to granting the permit and any recommended conditions that should be imposed.

(4) The county governing body shall hold a public hearing on the issue of compliance with this section. Notice of the time and place of such hearing including a general explanation of the matter to be considered shall be published at least 10 calendar days before the hearing in a newspaper of general circulation in the county or, if there is none, it shall be posted in at least three public places in the county.

(5) Any decision of a county governing body on an application for a permit to hold an outdoor mass gathering may be appealed to a circuit court for the county as provided in ORS 34.020 to 34.100.

(6) A county governing body may charge permit applicants a fee reasonably calculated to reimburse the county for its reasonable and necessary costs in receiving, processing and reviewing applications for permits to hold outdoor mass gatherings. However, a fee authorized by this subsection shall not exceed $5,000 and shall not be charged when the governing body finds, by a preponderance of the evidence presented to the governing body, that the applicant is unable to reimburse the governing body.

[1971, c.597, § 3; 1985, c.758, § 4; 1993, c.779, § 1]

Appendix D

433.755. Additional information required before permit issued; liability of permit holder; casualty insurance; county as additional insured.

(1) In reviewing an application for a permit to hold an outdoor mass gathering, the county governing body may require such plans, specifications and reports as it may deem necessary for proper review and it may request and shall receive from all public officers, departments and agencies of the state and its political subdivisions such cooperation and assistance as it may deem necessary. If the county governing body determines upon examination of the permit application that the outdoor mass gathering creates a potential for injury to persons or property, the county governing body may require organizers to obtain an insurance policy in an amount commensurate with the risk, but not exceeding $1 million. The policy of casualty insurance shall provide coverage against liability for death, injury or disability of any human or for damage to property arising out of the outdoor mass gathering. The county shall be named as an additional insured under the policy.

(2) In the event of failure to remove all debris or residue and repair any damage to personal or real property arising out of the outdoor mass gathering within 72 hours after its termination and to remove any temporary structures used at the outdoor mass gathering within three weeks after its termination, the county governing body may file suit against the organizer for financial settlement as is needed to remove debris, residue or temporary structures and to repair such damage to real or personal property of persons not attending the outdoor mass gathering. The organizer shall be wholly

responsible for payment of any fines imposed under ORS 433.990 (6).

[1971, c.597, § 4; 1985, c.758, § 5; 1993, c.779, § 2; 2001, c.104, § 158]

433.760. Rulemaking authority.

Notwithstanding any other provisions of law, the Department of Human Services shall, in accordance with the provisions of ORS chapter 183, make rules regulated according to anticipated crowds with respect to health and safety at outdoor mass gatherings which provide for:

(1) Adequate water supply, drainage and sewerage facilities;

(2) Adequate toilet facilities;

(3) Adequate refuse storage and disposal facilities;

(4) Adequate food and sanitary food service, if supplied;

(5) Adequate emergency medical facilities and communication systems;

(6) Adequate fire protection; and

(7) Adequate security personnel and traffic control.

[1971, c.597, § 5; 1981, c.82, § 4; 1985, c.758, § 8]

Appendix D

433.763. Compliance with land use regulations required; criteria for approval.

(1) Any gathering of more than 3,000 persons which continues or can reasonably be expected to continue for more than 120 hours within any three-month period and any part of which is held in open spaces shall be allowed by a county planning commission if all of the following occur:

(a) The organizer makes application for a permit to the county planning commission.

(b) The applicant demonstrates to the county planning commission that the applicant has complied or can comply with the requirements for an outdoor mass gathering permit set out in ORS 433.750.

(c) The county planning commission shall make findings that:

(A) Any permits required by the applicable land use regulations have been granted; and

(B) The proposed gathering:

(i) Is compatible with existing land uses; and

(ii) Does not materially alter the stability of the overall land use pattern of the area.

(2) The provisions of ORS 433.755 apply to any gatherings reviewed or approved under this section.

(3) A decision granting or denying a permit under this section may be appealed to the county governing body as provided in ORS 215.402 to 215.438.

(4) If a county has not created a planning commission as provided in ORS 215.030, the county governing body, or such other person as the governing body designates shall receive the application and make the findings and decision required by this section.

[1985, c.758, § 7]

433.765. Effect on county ordinances adopted under county charter.

Ordinances or regulations of a county enacted under a county charter adopted pursuant to section 10, Article VI, Oregon Constitution, and not inconsistent with ORS 433.735 to 433.770 and 433.990 (6) or any rules adopted under ORS 433.735 to 433.770 and 433.990 (6), are not superseded by ORS 433.735 to 433.770 and 433.990 (6) or such rules. Nothing in ORS 433.735 to 433.770 and 433.990 (6) or any rules adopted under ORS 433.735 to 433.770 and 433.990 (6) precludes the right of a county to enact ordinances or regulations under a county charter if such ordinances or regulations are not inconsistent with ORS 433.735 to 433.770 and 433.990 (6) or any rules adopted under ORS 433.735 to 433.770 and 433.990 (6).

[1971, c.597, § 6; 2001, c.104, § 159]

Appendix D

433.767. Application to gatherings defined by county ordinance.

ORS 433.735 to 433.770 and 433.990 (6) apply to outdoor mass gatherings defined by county ordinance as well as to those defined by ORS 433.735 (1).

[1981, c.82, § 2; 2001, c.104, § 160]

433.770. Enforcement.

(1) In addition to and not in lieu of the maintenance of other actions for any violation of ORS 433.745, the district attorney for the county in which an outdoor mass gathering is to be held may maintain an action in any court of general equitable jurisdiction to prevent, restrain or enjoin any violation of ORS 433.745.

(2) Cases filed under the provisions of this section or an appeal therefrom shall be given preference on the docket over all other civil cases except those given equal preference by statute.

[1971, c.597, § 6a; 1979, c.284, § 143]

* * *

Appendix D

PENALTIES

433.990. Penalties.

(1) Violation of ORS 433.004 or 433.008, 433.255, 433.260 or 433.715 is a Class A misdemeanor.

(2) Violation of ORS 433.010 is punishable, upon conviction, by imprisonment in the custody of the Department of Corrections for not more than three years.

(3) Violation of ORS 433.035 is punishable upon conviction by a fine of not less than $10 nor more than $100, or by imprisonment for not less than 10 days nor more than 30 days, or by both.

(4) Violation of ORS 433.850 is a Class D violation punishable by fines totaling not more than $50 per day, not to exceed $1,000 in any 30-day period.

(5) Violation of ORS 433.345 or 433.365 is a Class B violation. Failure to obey any lawful order of the Director of Human Services issued under ORS 433.350 is a Class C misdemeanor.

(6) Any organizer, as defined in ORS 433.735, violating ORS 433.745 is punishable, upon conviction, by a fine of not more than $10,000.

[Subsection (8) (1969 Replacement Part) enacted as 1957, c.422, § 2; subsection (8) derived from § 434.990; 1971, c.648, § 23; subsection (9) enacted as 1971, c.413,

§ 6; subsection (10) enacted as 1971, c.597, § 7; 1973, c.779, § 46; 1979, c.492, § 6; 1979, c.828, § 13; subsection (5) enacted as 1981, c.384, § 10; 1987, c.320, § 232; 1987, c.600, § 16; 1999, c.1051, § 182; 2001, c.104, § 166; 2001, c.636, § 5; 2001, c.990, § 7]

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No. 04-1735

In the Supreme Court of the United States

SOUTHERN OREGON BARTER FAIR,

Petitioner,

v.

STATE OF OREGON,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT STATE OF OREGON IN OPPOSITION

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QUESTIONS PRESENTED

1. Should this Court grant certiorari to review the question presented in the petition when this case appears to be moot because it is no more than speculative that petitioner will be able to stage another mass gathering, and thus be subject again to the state statutes that apply to outdoor mass gatherings?

2. Should this Court grant certiorari to review the question presented in the petition when there is considerable doubt that the state statutes, designed to protect the health and safety of those who attend outdoor mass gatherings, can be subject to a facial challenge because the statutes lack a close enough nexus to expression or to conduct commonly associated with expression?

3. If this case is not moot and if a facial challenge can be brought, did the court of appeals nevertheless correctly hold that the *Freedman*[1] procedural safeguards – specifically, the requirement of a deadline for taking official action on a permit application -- do not apply here because the statutes regulating outdoor mass gatherings are content-neutral time, place, and manner restrictions? That is, did the court of appeals correctly interpret and apply this Court's relatively recent decision in *Thomas v. Chicago Park Dist.*, 534 U.S. 316 (2002)?

4. Even if there is some doubt about the correctness of the court of appeals' interpretation and application of this Court's decision in *Thomas*, should this Court allow the issue to percolate longer in the lower courts, because the decision in *Thomas* is relatively recent, and because there is no intra- or inter-circuit split over the correct meaning of that decision?

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[1] *Freedman v. Maryland*, 380 U.S. 51 (1965).

TABLE OF CONTENTS

Page

Questions Presented i

Statement of the Case 1

Reasons for Denying Review 5

A. This case is moot because the possibility that petitioner might once again stage an outdoor mass gathering, and thus be subject to the act again, is no more than speculative. 5

B. The state act is not properly subject to a facial challenge. 8

C. On the merits, the court of appeals reached the right result 10

D. There is no inter- or intra-circuit split with regard to the meaning and effect of this Court's decision in *Thomas* 12

Conclusion 15

TABLE OF AUTHORITIES

Page

Cases Cited

Broadrick v. Oklahoma,
413 U.S. 601 (1973) 8, 10

City News & Novelty, Inc. v. City of Waukesha,
531 U.S. 278 (2001) 6, 7

City of Erie v. Pap's A.M.,
529 U.S. 277 (2000) 6, 7

City of Littleton v. Z.J. Gifts D-4,
541 U.S. ___, 124 S. Ct. 2219, 159 L. Ed. 2d 84 (2004) .. 11

Dallas v. Stanglin,
490 U.S. 19 (1989) 9

Freedman v. Maryland,
380 U.S. 51 (1965) ..... i, 3, 4, 11, 12, 13, 14

FW/PBS, Inc. v. Dallas,
493 U.S. 215 (1990) 8, 11

Granite State Outdoor v. City of Clearwater, Fla.,
351 F.3d 1112 (11th Cir 2003) 13

Griffin v. Secretary of Veterans Affairs,
288 F.3d 1309 (Fed. Cir.),
cert. denied 537 U.S. 947 (2002) 14

Lakewood v. Plain Dealer Publishing Co.,
486 U.S. 750 (1988) 8, 10

Lombardo v. Warner,
353 F.3d 774, 775-76 (9th Cir. 2003),
opin. withdrawn, en banc review granted,
371 F.3d 538 (9th Cir. 2004) 13, 14

Lombardo v. Warner,
371 F.3d 538 (9th Cir. 2004) 13

Lombardo v. Warner,
391 F.3d 1008 (9th Cir. 2004) 13, 14, 15

National Endowment for Arts v. Finley,
524 U.S. 569 (1998) 8

New England Reg. Council of Carpenters v. Kinton,
284 F3d 9 (1st Cir 2002) 13

Riley v. National Federation of Blind,
487 U.S. 781 (1988) 11

So. Ore. Barter Fair v. Jackson County, Oregon,
372 F.3d 1128 (9th Cir. 2004) 1, 2, 5

THG Enterprises Inc. v. City of El Cajon,
60 Fed. Approx. 711 (9th Cir. 2003) 13

Thomas v. Chicago Park Dist.,
534 U.S. 316 (2002) ..... i, 3, 4, 5, 10, 11, 12, 13, 14

Utah Animal Rights v. Salt Lake City Corp.,
371 F.3d 1248 (10th Cir 2004) 13

Washington v. Yakima Indian Nation,
439 U.S. 463 (1979) 3

Constitutional and Statutory Provisions

42 U.S.C. § 1983 1

Or. Rev. Stat, § 433.750(1) 2

Or. Rev. Stat, § 433.760 2

Or. Rev. Stat. § 34.105-.240 10

Or. Rev. Stat. § 34.110 10

Or. Rev. Stat. § 433.735(1) 1

Or. Rev. Stat. § 433.735(2) 2
Or. Rev. Stat. § 433.740 1
Or. Rev. Stat. § 433.745(2) 2
Or. Rev. Stat. § 433.750(1) 2, 3
Or. Rev. Stat. § 433.760 4
U.S. Const. amend. I 8, 9, 14

Administrative Rules

Or. Admin. R. 333-039-0015(1)(a) 2
Or. Admin. R. 333-039-0025(3)(a) 2

STATEMENT OF THE CASE

This case involves solely a facial challenge to the Oregon statutes that regulate "outdoor mass gatherings" of more than 3,000 people that continue or reasonably can be expected to continue for more than 24 but less then 120 hours. Or. Rev. Stat. § 433.735(1) (Pet. Cert., App D, 76 a). Petitioner, the Southern Oregon Barter Fair, also brought an as-applied challenge against the county defendants; while the merits of the facial challenge were on appeal, the as-applied challenge, in the form of a 42 U.S.C. § 1983 action, proceeded to trial, where petitioner prevailed. Petitioner's claims against the county defendants eventually were settled. *So. Ore. Barter Fair v. Jackson County, Oregon*, 372 F.3d 1128, 1133 n. 7 (9th Cir. 2004).[2]

In general, the state statutes that regulate outdoor mass gatherings require compliance with health and safety rules for outdoor, overnight gatherings of more than 3,000 people, held primarily in an open space and not in any permanent structure. Or. Rev. Stat. § 433.735(1). In adopting the act, the state legislature found that "uncontrolled outdoor gatherings of large groups of persons for extended periods of time have [created] a need for the establishment of reasonable health and safety rules to regulate such outdoor mass gatherings." Or. Rev. Stat. § 433.740. The act therefore "authorizes the Department of Human Services to promulgate rules with respect to various health and safety issues at mass gatherings,

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[2] Although what transpired during what the court of appeals termed the "tumultuous" 1996 permit application process may provide background, 372 F.3d at 1132, because a facial challenge only is before this Court those events do not bear directly on the analysis of the question petitioner presents. The State played no role in the 1996 events. The State also was not involved in defending the as-applied section 1983 claim.

including adequate water supply, drainage and sewage facilities, toilet facilities, refuse storage and disposal facilities, food, sanitary food service, emergency medical facilities, fire protection, security personnel and traffic control. [Or. Rev. Stat, § 433.750(1) and 433.760]."[3] *So. Oregon Barter Fair*, 372 F.3d at 1131.

The act prohibits "outdoor mass gatherings," as defined by the act, on property owned, leased, or possessed by the organizer (who is either the person who holds, stages, or sponsors the gathering, or the owner, lessee, or possessor of the real property where the event is to take place) unless the county governing body for the location where the gathering is planned has issued a permit. Or. Rev. Stat. §§ 433.735(2), 433.745(2). In its opinion, the court of appeals' panel explained that the organizer of an outdoor mass gathering "must submit to the [county] governing body a permit application containing the applicant's name and address, a legal description of the place, the date, the estimated attendance, and the nature of the proposed gathering, as well as '[s]uch other appropriate information as the county governing body may require in order to insure compliance with rules of the Department of Human Services.'" 372 F.3d at 1131, quoting Or. Rev. Stat. § 433.750(1).

The county governing body "shall issue a permit * * * when the organizer demonstrates compliance or the ability to comply with the health and safety rules governing outdoor mass gatherings to be regulated according to the anticipated

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[3] For example, organizers must ensure that they have available a minimum of 12 gallons of water per person per day. Or. Admin. R. 333-039-0015(1)(a). Organizers must also demonstrate that they have a minimum of seven toilets for each 800 persons anticipated to attend. Or. Admin. R. 333-039-0025(3)(a).

crowd and adopted by the Department of Human Services." Or. Rev. Stat. § 433.750(1). "[O]nce the applicant demonstrates compliance with the regulations, the governing body has absolutely no discretion to withhold the permit[.]" 372 F.3d at 1137.

The court of appeals' panel that heard this case rejected the State's claim that the case was moot because "the Fair has not applied for a mass gathering permit, or engaged in any other preparations for a mass gathering, since 1996[.]" 372 F.3d at 1133. The panel decision also rejected the State's contention that the mass-gathering statutes are not subject to a facial challenge. *Id.* at 1135-36.[4]

On the merits, the court of appeals determined that the act was not facially-flawed because it lacks a deadline within which the local governing body must act on a permit application.[5] The court reasoned that the requirement for such a deadline was one of the *Freedman* procedural protections, but that in *Thomas* this Court had "clarified that none of the *Freedman* safeguards are required of content-neutral time, place, and

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[4] Although the court of appeals disagreed with the State's claims that this case is moot and that a facial challenge can not be brought, because the State prevailed on the merits and does not seek to alter the judgment the State can raise those claims before this Court without filing a cross-petition. *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n. 20 (1979) (cross-petition is not necessary to enable a prevailing party to defend judgment "on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals").

[5] The court of appeals also rejected other claims made by petitioner, but none of those are raised in the petition that is before this Court.

manner permit schemes." *Id.* at 1137, citing *Thomas*, 534 U.S. at 320-23. The Oregon act was "clearly a content-neutral time, place, and manner regulation." 372 F.3d at 1137.

> The Act applies to all mass gatherings irrespective of the purpose for the gathering. * * * [T]he Act does not single out any particular activity or speech for regulation. It authorizes the Department of Human Services to promulgate regulations with respect to water supply, fire protection, and similar health and safety issues attendant on overnight gatherings of large crowds. Or. Rev. Stat. § 433.760. None of these health and safety issues has anything to do with censoring the content of the applicant's speech. * * * Additionally, once the applicant demonstrates compliance with the regulations, the governing body has absolutely no discretion to withhold the permit * * *. Nothing in the Act purports to regulate gatherings on the basis of their subject matter or the organizers' or attendees' viewpoint. On its face, the Act is content-neutral.

Id. at 1137-38.

Because the act is content neutral, it "need not contain the procedural safeguards required of content-based regulations." *Id.* at 1138. Specifically, "[t]he Act need not include * * * a deadline for consideration by the [county] governing body[.]" *Id.* Although the act still is required to contain adequate standards to guide official decision-making, it has such objective standards. And the failure to include the *Freedman* procedural safeguards, including a deadline for official action on a permit application, does not itself "confer unbridled discretion on the County[.]" *Id.* Therefore, "[t]he lack of a permit application deadline is not sufficient to invalidate the Act on a facial chal-

lenge." *Id.* at 1139. "Should abuse occur, it may be remedied adequately through as-applied challenges like the Fair's § 1983 claim[.]" *Id.*

Petitioner later sought rehearing or rehearing en banc in the court of appeals, but its petition was denied.[6] *Southern Oregon Barter Fair v. Jackson County, Or.*, 401 F.3d 1124, 1124 (9th Cir. 2005). Judge Berzon, joined by six other members of the court, dissented from the denial of rehearing en banc. *Id.* at 1124-29. She believed that the panel had misread this Court's decision in *Thomas* and that, post-*Thomas*, a deadline for official action was required, even where a content-neutral time, place, and manner regulation was being challenged.

REASONS FOR DENYING REVIEW

A. This case is moot because the possibility that petitioner might once again stage an outdoor mass gathering, and thus be subject to the act again, is no more than speculative.

The last time petitioner applied for a permit to hold an outdoor mass gathering and held such a gathering was in 1996. Since that time it has not applied for a permit and the act has not presented any obstacle to petitioner organizing or holding a mass gathering. (Supp. E.R. 6). In an affidavit filed in the district court, one of the Fair's board members explained that the person who owned the land where the Fair was held in 1996 "was no longer amiable with us" and that the "site was no longer available." (Supp. E.R. 17-18). Since 1996, the Fair has not been able to locate an adequate site. (Supp. E. R. 15-16). A lack of adequate funding also has been

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[6] Petitioner twice suggests that the court of appeals heard this case en banc (Pet. Cert. 1, 4), but that is incorrect.

a significant obstacle to petitioner's ability to conduct another barter fair. (Supp. E.R. 17).

Based on this record, the court of appeals' panel rejected the State's claim that this case is moot. The court agreed that the "proceeding would be moot if the Fair had entirely ceased to operate, left the business, and no longer sought or intended to seek a license." 372 F.3d at 1134 (citation omitted). But the court determined that the Fair had "a sufficient ongoing interest in the outcome of the case to preclude mootness." *Id.* It had not "ceased to exist as a corporate entity," or lost all hope of or interest in holding another gathering. *Id.* Because the court could not "say that there is no reasonable expectation that the state will enforce the Act against the Fair again," the case was not moot. *Id.*

In reaching its conclusion, the court relied heavily on this Court's decisions in *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), and *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278 (2001). *Id.* at 1133-34. The court seemed to conclude that, under *City News,* this case would be moot only if petitioner had "entirely ceased to operate, left the business, and no longer sought or intended to seek a license." *Id.* at 1134, citing *City News*. The panel, however, misread those decisions.

The court gave an overly-narrow reading to this Court's decision in *City News. City News* was a challenge to a licensing scheme for adult entertainment businesses. 531 U.S. at 281-82. In the midst of the proceeding, the licensee ceased to operate as a business. *Id.* at 283. The licensee argued that the case was not moot because it had never promised not to apply for a new license. *Id.* To resolve the mootness issue, this Court first examined its decision in an earlier case, *City of Erie v. Pap's A.M.* In that case, the licensee sought to have the case declared moot after prevailing in its constitutional challenge to a state statute. The licensee asserted that it had

ceased to operate its business. 529 U.S. at 287. The Court in the *Erie* case concluded that the case was not moot in part because the business "could again decide to operate." *Id.* The Court gave the additional reason that because the licensee had prevailed below, the City of Erie had the ongoing injury of being unable to enforce its ordinance. *Id.* at 288.

In *City News*, this Court clarified that the fact that the business in *Erie* could again have decided to operate was insufficient to establish a live controversy in that case. *City News*, 531 U.S. at 283. As the Court explained, "[t]hat speculation standing alone, however, did not shield the case from a mootness determination." *Id.* It was only because of the additional reason given by the *Erie* court – the city's ongoing injury – that the case presented a live controversy. Thus, *City News* is best read for the proposition that to present a live controversy sufficient to challenge the facial validity of a permitting statute, the person presenting the challenge must demonstrate more than a speculative possibility that the person will reapply for a permit. In *City News*, the Court found that the mere fact that the licensee had not promised not to reapply failed to preserve a live controversy.

In this case, although it appears that petitioner would like to conduct another barter fair, lack of funding, and its failed efforts to find a site over the course of five years, demonstrate only a speculative possibility that another fair ever will take place. Put differently, a party who lacks the practical ability to put on a future event, and who thus lacks any practical reason to reapply for a permit, presents a controversy every bit as speculative as does a plaintiff who lacks a firm intention to reapply. For that reason, this case is moot. That fact, or even the serious possibility that the case is moot, weighs against a grant of certiorari in this case.

B. The state act is not properly subject to a facial challenge.

The court of appeals' panel also rejected the State's claim that the state statutes regulating outdoor mass gatherings are not properly subject to a facial challenge. Although the panel recognized that "[c]ourts generally disfavor facial challenges to legislation," and although it admitted that "[i]t is certainly possible to imagine gatherings that might be subject to the Act but that are purely recreational and devoid of expressive purpose, such as some carnivals, festivals, and exhibitions," it nonetheless held that petitioner could bring a facial challenge because "the statute is broad enough to cover gatherings that are expressive" and because "mass gatherings bear a sufficient nexus to conduct commonly associated with expression." 372 F.3d at 1135, 1136. The panel erred, however.

As a general rule, federal courts will not entertain facial challenges to statutes. *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 223 (1990) ("[f]acial challenges to legislation are generally disfavored."); *see also National Endowment for Arts v. Finley*, 524 U.S. 569, 580 (1998). A limited exception to the general rule has been carved out in certain circumstances where First Amendment interests are implicated. *Broadrick v. Oklahoma*, 413 U.S. 601, 611-12 (1973). But that exception "is, manifestly, strong medicine that has been employed by the Court sparingly and only as a last resort." 413 U.S. at 613.

This Court's decision in *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 759 (1988), articulated the standard for "distinguish[ing] laws that are vulnerable to facial [First Amendment] challenge from those that are not." In *Lakewood*, the Court held that for a licensing law to be subject to facial invalidation, it must "give[] a government official or agency substantial power to discriminate based on the content or viewpoint of speech," and it "must have a close enough nexus to expression, or to conduct commonly associ-

ated with expression, to pose a real and substantial threat" of censorship. *Id.* As the Court explained, if the law is not directed "narrowly and specifically" at expressive activities, it "provide[s] too blunt a censorship instrument to warrant judicial intervention prior to an allegation of actual misuse." *Id.* at 761. Thus, even those laws that provide government officials with unbridled discretion are not subject to facial challenge if they are not specifically directed at conduct commonly associated with expression.

Although the court of appeals may not have misstated these principles, it misapplied them. The state law does not regulate speech or patently expressive conduct. Rather, it applies to large groups of people who congregate overnight in one place. It is true that some such groups may congregate for an expressive purpose, just as people may choose to sit on public streets for an expressive purpose. But such conduct is not patently expressive. Groups of 3,000 or more may congregate overnight for other activities like carnivals, festivals, sporting events, or rodeos. Such events are not commonly considered the type of expressive conduct protected by the First Amendment. *See Dallas v. Stanglin*, 490 U.S. 19, 25 (1989) ("It is possible to find some kernel of expression in almost every activity a person undertakes – for example, walking down the street or meeting one's friends at a shopping mall – but such a kernel is not sufficient to bring the activity within the protection of the First Amendment").[7]

In sum, the court of appeals erred when it concluded that the state law is properly subject to a facial challenge. The court reached that conclusion even though the state law does not

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[7] The court of appeals' panel suggested that "it is not crystal clear whether the purposes of [even] the Fair are expressive." 372 F.3d at 1135.

"give[] a government official or agency substantial power to discriminate based on the content or viewpoint of speech," *Lakewood*, 486 U.S. at 759, and indeed even though the law is both content and viewpoint neutral. And, although the applicable test requires the presence of a "close enough nexus to expression, or to conduct *commonly* associated with expression," *id.* (emphasis added), the court of appeals was willing to find a sufficient nexus based on the mere possibility that the act might affect conduct associated with expression. The court, thus, failed to heed this Court's warning that facial challenges should be employed "sparingly and only as a last resort." *Broadrick*, 413 U.S. at 613. Moreover, even if the panel ultimately was correct in deciding that a facial challenge can be brought here, the strong possibility that it was not correct is a factor that cautions against granting the petition.[8]

C. On the merits, the court of appeals reached the right result.

The principal claim made in the petition, and in the opinion dissenting from the denial of rehearing en banc, is that the panel erred in holding that, at least post-*Thomas*, a content-neutral

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[8] The fact that the state law is not properly subject to a facial challenge does not leave those to whom the law is applied without remedies, as petitioner's as-applied challenge demonstrates. Remedies, in particular a circuit court mandamus proceeding, also are available to force a possibly recalcitrant local government to act on an application for a permit. *See* Or. Rev. Stat. § 34.105-.240 (regarding mandamus procedure). The court of appeals' dissenting opinion suggests that obtaining relief in mandamus "requires proof of illicit motive," 401 F.3d at 1127, but that is incorrect, at least under Oregon law. Under state law, a writ of mandamus may be issued "to compel the performance of an act which the law specially enjoins." Or. Rev. Stat. § 34.110. There is no "illicit motive" requirement.

time, place, and manner restriction need not include the *Freedman* procedural safeguards, and specifically that such a regulation need not contain a deadline for official action on a permit application. (Pet. Cert. 1, 4); 401 F.3d at 1125 ("My central quarrel with the panel's decision is its fundamental misreading of *Thomas*"). According to the dissent from the denial of rehearing en banc, the requirement of a deadline for official action on a permit application is not a *Freedman* procedural safeguard, but instead an aspect of "*Thomas's second* holding: whether [the state act] 'contain[s] adequate standards to guide the official's discretion and render it subject to effective judicial review.'" 401 F.3d at 1125-26, quoting *Thomas*, 534 U.S. at 323 (emphasis in court of appeals' opinion).

However, it is the decision dissenting from the denial of rehearing en banc, not the panel decision, that is incorrect. This Court consistently has treated the requirement of a prompt official decision as a part of the *Freedman* procedural safeguards. *See Thomas*, 534 U.S. at 321 (among the procedural safeguards required under *Freedman* are the requirement that "any restraint prior to judicial review can be imposed only for a specified brief period") (internal quotation marks and citation omitted); *FW/PBS, Inc. v. Dallas*, 493 U.S. at 226 (a prior restraint that fails to place limits on the time within which the decisionmaker must act is impermissible, citing *Freedman*) (O'Connor, J., joined by Stevens and Kennedy, JJ.), *id.* at 240 (state "must provide that the licensor will, within a specified brief period, either issue a license or go to court") (Brennan, J., joined by Marshall and Blackmun, JJ.) (citations and internal quotation marks omitted); *Riley v. National Federation of Blind*, 487 U.S. 781, 802 (1988) (a licensing regulation "must provide that the licensor 'will, within a specified brief period, either issue a license or go to court,'" quoting *Freedman*, 380 U.S. at 59).[9]

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[9] Petitioner relies on *City of Littleton v. Z.J. Gifts D-4*, 541 U.S. ___, 124 S. Ct. 2219, 159 L. Ed. 2d 84 (2004), contending that it

Thus, contrary to the position taken by the court of appeals' dissenting opinion, the requirement of a prompt official decision made in response to a permit application *is* part of the trio of *Freedman* procedural safeguards. This Court has said so repeatedly.

And this Court was unequivocal in *Thomas*, holding that "*Freedman* [was] inapposite because the licensing scheme at issue [in *Thomas*] is not subject-matter censorship but content-neutral time, place, and manner regulation[.]" 534 U.S. at 322. That is, this Court "ha[s] never required that a content-neutral permit scheme regulating speech * * * adhere to the procedural requirements set forth in *Freedman*." *Id.* (footnote omitted). Thus, it is the court of appeals' dissenting opinion, not the panel decision, that misreads *Thomas*.

D. There is no inter- or intra-circuit split with regard to the meaning and effect of this Court's decision in *Thomas*.

Petitioner indicates that there is a conflict between the panel decision in this case and "other interpretations of the *Thomas* decision within the Ninth Circuit." (Pet. Cert. 8). For the other side of this supposed conflict, he impermissibly relies, however, on an unpublished court of appeals' decision, which also is so terse as to be almost completely uninformative. *See* Ninth Circuit Rule 36-3 (unpublished dispositions are not binding precedent and may not be cited to the court or by the courts of the circuit, except in certain limited circumstances, none of which

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"directly points to a result different from that achieved by the panel" (Pet. Cert. 7), but that decision is not to the contrary. In that case, as well as those cited above, this Court said that among the *Freedman* procedural safeguards was the requirement of "strict time limits leading to a speedy administrative decision and minimizing any 'prior restraint'-type effects." *Id.*, 159 L. Ed. 2d at 91.

applies here); *THG Enterprises Inc. v. City of El Cajon*, 60 Fed. Approx. 711 (9th Cir. 2003).[10] In fact, there is no intra-circuit conflict as to the meaning and application of *Thomas*.

There also is no inter-circuit conflict. Instead, every federal court of appeals that has considered the issue post-*Thomas* has agreed with the panel decision in this case and has held that the *Freedman* procedural safeguards, which include the requirement of a prompt official decision on a permit application, do not apply to content-neutral time, place, and manner regulations. *See New England Reg.Council of Carpenters v. Kinton*, 284 F3d 9, 21 (1st Cir 2002) (in *Thomas*, "the Court clarified that *Freedman*'s procedural requirements do not apply to permit schemes that eschew any consideration of the content of speech"); *Utah Animal Rights v. Salt Lake City Corp.*, 371 F.3d 1248 (10th Cir 2004) (that case was "not governed by *Freedman* and its progeny, which apply to content-based licensing or censorship schemes, but by *Thomas*"); *Granite State Outdoor v. City of Clearwater, Fla.*, 351 F.3d 1112, 1118 (11th Cir 2003) ("time limits are required when their lack could result in *censorship* of certain viewpoints or ideas, *see e.g., Freedman*, but are not categorically required when the permitting scheme is content-neutral," citing *Thomas*) (emphasis in original); *Griffin v. Secretary of Veterans Affairs*, 288 F.3d 1309, 1328 (Fed.

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[10] On page 9 of the petition, in the middle of the page, petitioner appears to be quoting from the court's published decision in *Lombardo v. Warner*, 353 F.3d 774 (9th Cir. 2003). But petitioner actually still is quoting from the unpublished decision in *THG Enterprises*. In any event, the panel decision in *Lombardo*, which is not contrary to the decision in this case, was withdrawn when the case was accepted for rehearing en banc. *Lombardo v. Warner*, 371 F.3d 538 (9th Cir. 2004). The court later certified questions of state law to the Oregon Supreme Court. *Lombardo v. Warner*, 391 F.3d 1008 (2004). The certified questions are before that court now.

Cir.), *cert. denied* 537 U.S. 947 (2002) ("Few cases invoke the requirement for procedural safeguards unless an explicit censorship scheme – which by definition is not content-neutral – is under attack, and the Supreme Court recently has confirmed that the procedural safeguards doctrine is so limited in scope," citing *Thomas*).

Thus, there is no inter-circuit conflict that might command this Court's attention. Instead, with the exception of the dissenting opinion in the Ninth Circuit, there is a pool, if not yet a lake, of uniformity and common understanding. There is relatively little reason in this situation for the Court to step in now, if it ever needs to do so. The issue can be left to percolate longer in the lower courts.

That is particularly true here because the issue of the meaning of *Thomas*, and whether, post-*Thomas,* a content-neutral time, place, and manner regulation must contain a deadline for official action, is almost certain to be before the Ninth Circuit again when *Lombardo v. Warner* returns from the Oregon Supreme Court. That case deals with permits to erect certain signs visible from state highways. *Lombardo v. Warner,* 353 F.3d 774, 775-76 (9th Cir. 2003), *opin. withdrawn, en banc review granted,* 371 F.3d 538 (9th Cir. 2004). Among the issues that are before the court of appeals in the case is whether a provision of the act under scrutiny there, which provides for a variance from certain provisions of the act, but which contains no deadline for official action on a request for a variance, violates the First Amendment "because it contains no time limit within which the [state] Department must act on an application for a variance." *Lombardo v. Warner*, 391 F.3d 1008, 1009 (9th Cir. 2004). In support of that constitutional claim, Lombardo, like the petitioner here, cites and relies on *Freedman* and its progeny. *Id.* Before addressing Lombardo's claim that the lack of time limits amounts to a constitutional flaw, the Ninth Circuit has asked the state court whether, when a state statute contains no express

time limitation, state law may otherwise supply some time limitation. *Id.* at 1010. After the state court answers that question, the constitutional question will be back before the en banc federal court. There thus is little reason for this Court to take the issue up now. Petitioner here was unable to obtain en banc review in the court of appeals, but the en banc court eventually will confront in *Lombardo* the same issue petitioner raises.

CONCLUSION

This court should deny the petition for a writ of certiorari.

Respectfully submitted,

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In the Supreme Court of the United States

SOUTHERN OREGON BARTER FAIR,
Petitioner,

v.

STATE OF OREGON,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

1. New Issues Presented in Brief of Respondent State of Oregon in Opposition 1

A. The Question of Mootness 2

B. The Question of a Facial Challenge 5

Conclusion 9

TABLE OF AUTHORITIES

Cases

Arizonans for Official English v. Arizona,
520 U.S. 43, 117 S.Ct. 1055,
137 L.Ed.2d 170 (1997) 3

Church of the Holy Trinity v. United States,
143 US 45 (1892) 8

City of Erie v. Pap's A.M.,
529 US 277 (2000) 4

City News & Novelty, Inc v. City of Waukesha,
531 US 278 (2001) 2-3, 4

Forsyth County Georgia v. Nationalist Movement,
505 U.S. 123 (1992) 3

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,
528 U.S. 167 (2000) 5

Frisby v. Schultz,
487 US 474, 108 S Ct 2495 (1988) 3

Lombardo v. Warner, 353 F3d 774 (9th Cir. 2003),
opin. withdrawn, en banc review granted,
371 F3d 538 (9th Cir. 2004) 7

Lombardo v. Warner, 391 F3d 1008 (9th Cir. 2004) . . 7

Shuttlesworth v. City of Birmingham,
394 US 147, 89 S Ct 935, 22 L Ed2d 162 (1969) . . 3

Southern Oregon Barter Fair v. Jackson County, Oregon,
401 F.3d 1124 (2005) 2

Southern Oregon Barter Fair v. Jackson County, Oregon,
372 F.3d 1128 (9th Cir. 2004) 3

Thomas v. Chicago Park Dist,
534 U.S. 316, 122 S Ct. 775,
151 L Ed.2d 783 (2002) 1, 3, 4, 7

Ward v. Rock Against Racism,
491 US 781, 109 S Ct 2746 (1989) 3

Statute

ORS 433.750(1) 8

Other Authority

Antonin Scalia, A Matter Of Interpretation, Federal Courts and the Law 92 (Amy Guttman ed. 1997.) 8

1. NEW ISSUES PRESENTED IN BRIEF OF RESPONDENT STATE OF OREGON IN OPPOSITION

In opposition to this Court's grant of Petitioner's Writ of Certiorari, Respondent raises two new issues:

A. This case is moot because it is no more than speculative that Petitioner will be able to stage another mass gathering, and thus be subject again to the state statutes that apply to outdoor mass gatherings.

B. The state's Mass Gathering Act is not subject to facial challenge because the statutes lack a close enough nexus to expression or to conduct commonly associated with expression.

Respondent's suggestion this Court allow the issue to percolate in the lower courts because the decision in Thomas is relatively new[1] lacks both reason and dignity. Petitioner further addresses this collateral suggestion, in part, within Petitioner's Reply to the two issues mentioned above. Respondent also suggests this Court delay hearing this issue because there is no intra- circuit or inter-circuit split over the meaning in Thomas. (Page 12-15, Brief of Respondent.) This statement is a misstatement of law, as presented in Petition as well as in the Ninth Circuit's Dissent Opinion to the Order

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[1] Question No. 4, Page I, and Page 14, Brief of Respondent. Thomas refers throughout to Thomas v. Chicago Park Dist, 122 S Ct. 775, 534 U.S. 316, 151 L Ed.2d 783 (2002).

Denying En Banc[2]. Petitioner will resist the temptation to repeat what has already been briefed, in the interest of brevity, and respect.

A. The Question Of Mootness

Respondent's pursuit of this issue is replete with obfuscation, misdirection, and mischaracterization of law and fact in a weak attempt to distract this Court's attention from the vital issues properly before this Court. Distilled to its essence, Respondent State of Oregon is asking this Court to allow an unconstitutional prior restraint, susceptible to government sponsored censorship of ideas, to persist because of this extraneous irrelevant question - which has no basis in fact. Petitioner Corporation is sound, current, and actively seeking new land. Minor other events have occurred under the corporate name.

The Ninth Circuit's three-judge panel declined to find this case moot, stating:

> The state contends that the possibility that the Fair will actually obtain funding and a site is speculative. On this record, however, we cannot conclude that the barriers to the Fair's staging another event are "insurmountable" and therefore enough to moot the case. Here, as in Clark, the Fair's "stated intention to return to business if the[statute] is declared unconstitutional," together with the ongoing efforts the Fair has made to arrange another gathering, sufficiently distinguish it from the plaintiff in City

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[2] Southern Oregon Barter Fair v. Jackson County, Oregon, 401 F.3d 1124, 1126-27 (2005).

> News. We cannot say that there is no reasonable expectation that the state will enforce the Act against the Fair again. (Southern Oregon Barter Fair v. Jackson County, Oregon, 372 F.3d 1128,1134 (C.A.9 (Or.),2004.)

Respondent State of Oregon assumes facts not in evidence when it disparagingly characterizes Petitioner, and Petitioner's event, as speculative. There is nothing in the record - excepting Respondent's own self-serving, conclusory remarks - upon which to base such a premise. In fact, Respondent is speculating about the status of Petitioner and future or current events. The Ninth Circuit's panel was correct: "On this record, however, we cannot conclude that the barriers to the Fair's staging another event are 'insurmountable' and therefore enough to moot the case." (Id.)

In no other instance has this court raised the issue of recurrence as a prerequisite against mootness, and for review. Consider: Forsyth County Georgia v. Nationalist Movement, 505 U.S. 123 (1992), Ward v. Rock Against Racism, 109 S Ct 2746, 491 US 781 (1989), Frisby v. Schultz, 487 US 474, 108 S Ct 2495, (1988), Shuttlesworth v. City of Birmingham, 394 US 147, 89 S Ct 935, 22 L Ed2d 162 (1969), and even Thomas v. Chicago Park Dist, 122 S Ct. 775, 534 U.S. 316, 151 L Ed.2d 783 (2002) itself. Nowhere was there a suggestion any of the parties contesting the licensing scheme would have to prove they were going to conduct a future event. Merely that they were still active, still in existence, and still a party to the action. (See, Arizonans for Official English v. Arizona, 520 U.S. 43, 48, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997), where Party bringing suit no longer government employee, thereby no longer having standing to continue suit.)

Respondent provides no authority for the extreme position taken to dismiss this action, and no authority how this action differs from those cited above. It is Respondent State of Oregon who misconstrues the applicability of City of Erie v. Pap's A.M., 529 US 277 (2000), and City News & Novelty, Inc v. City of Waukesha, 531 US 278 (2001). In each case, the license was prospective - forward looking to an established ongoing business. This instance is retrospective for an event that occurred, without the permit application signifying any future expectations. In this manner of application, Petitioner is similar to those parties referenced above, and dissimilar to PAP's A.M. and City News & Novelty. Prior activity in the arena is sufficient to maintain standing so long as it does not become impossible to conduct another event. "'The underlying concern is that, when the challenged conduct ceases such that there is no reasonable expectation that the wrong will be repeated, then it becomes impossible for the court to grant any effectual relief whatever to the prevailing party.' City of Erie, 529 U.S. at 287, 120 S.Ct. 1382." (Barter Fair, Supra, at 1133-34.) The Ninth Circuit Panel also correctly announced, "The party asserting mootness bears the burden of establishing that there is no effective relief remaining that the court could provide." (Id., 1134.)

The State's position has remained consistent throughout these many years – Respondent is unconcerned about the constitutionality of its Mass Gathering Act. For the many years subsequent to the District Court's Preliminary Injunction holding Oregon's Mass Gathering Act unconstitutional on its face, prior to Thomas, the State failed to conform to the District Court's Holding. Perhaps had the State chose to amend or repeal its statute to conform to First Amendment jurisprudence, the issue would be moot. But even then the state would have the "heavy burden of persuading"

the court that "subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 189-90 (2000).

Ultimately, it can be said the State of Oregon is hoping this Court will disagree with the views of Petitioner sufficient to ignore an unconstitutional permit scheme. And this underlies Respondent's motive in raising such indefensible grounds upon which to decline Certiorari.

B. The Question of a Facial Challenge

As an initial matter, it is important for Respondent to appreciate the full text of the First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or **the right of the people peaceably to assemble**, and to petition the Government for a redress of grievances. (Emphasis added.)

The right of the people to peaceably assembly is implicated in all gatherings (congregations according to Respondent – See Page 9, Brief of Respondent), particularly those on private land, espousing cultural and religious expression. (See, Infra.)

Respondent State of Oregon assumes facts not in evidence when it disparagingly characterizes Petitioner, and Petitioner's event, as not expressive. There is nothing in the record - excepting Respondent's own self-serving, conclusory remarks - upon which to base such a premise. Indeed, although Respondent asks this Court to find as irrelevant the

"tumultuous 1996 permit application process"[3], it is well known to Respondent that Petitioner's favorable verdict in the companion § 1983 action against Jackson County, including a $25,000 punitive damage award against the Jackson County Sheriff, was based entirely upon the County Defendants' animus toward the event and its attendees - originating precisely from a disagreement with their expressive conduct![4] The Ninth Circuit three Judge panel described the event: "The Fair describes its event as a religious gathering, a 'harvest celebration and gathering of ... 'new age,' 'back-to-the-land' hippies and friends,' and a 'counterculture crafts fair' where artisans and vendors set up booths for people to buy crafts." (Barter Fair, Supra., at 1130. Emphasis added.)

Moreover, when Respondent suggests this Court pass over this case and direct its attention to what it believes is a more worthy upcoming Ninth Circuit case, one can only conclude Respondent's subtext to this Court includes a reference that this Petitioner's people aren't as good as the other Petitioner's

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[3] at Footnote 2, Brief for Respondent.

[4] Respondent's contention that the statute is constitutional because, as Petitioner's civil action demonstrated, the courts provide a remedy, is misplaced and misconstrued. (Footnote 8, Brief of Respondent.) Respondent is saying that only those applicants with sufficient resources to hire an attorney to force the governing body to abide by the First Amendment may enjoy the protections of the First Amendment. This is not what the First Amendment says. Its text is: "Congress shall make no law abridging the right." Through the Fourteenth Amendment, Oregon's Mass Gathering Act abridges the right, and shall not persist.

people.[5] Suggesting this Court could withhold ruling on this issue, with this Petitioner, because the issue is brewing in another Ninth Circuit case, with people whose views are more palatable to us good people, reveals Respondent's own animus to the expression of Petitioner; while welcoming, and assuming, this Court will do the same. It is difficult to imagine another reasoning behind asking this Court to wait for another case in order to rule on an issue so vital to First Amendment jurisprudence[6].

Respondent fails to appreciate what grave harm the absence of a reasonable time frame within which to review an application for permit does to the free and uncensored expression of speech and assembly. Preventing government bodies from possessing the discretion to approve or not

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[5] At pages 13 - 15, including fn 10, Brief for Respondent, Respondent invites this Court to withhold ruling on this case because the issue is coming up in Lombardo v Warner, 353 F3d 774 (9th Cir 2003), *opin. withdrawn, en banc review granted*, 371 F3d 538 (9th Cir. 2004), currently before the Oregon Supreme Court on certified questions from the Ninth Circuit. (391 F3d 1008 (9th Cir. 2004).) Petitioner notes Respondent's characterization of the two cases is misleading. At Page 14, Brief for Respondent, Respondent avers, "Lombardo, like the Petitioner here, cites and relies on Freedman and its progeny." Petitioner here expresses no such reliance in the Petition for Certiorari. Rather, Petitioner argued the sort of unbridled discretion infecting the Oregon Act by not requiring a time frame for review, is of the type this Court held to remain outside Constitutional permissibility, apart from the Freedman safeguards extolled in Thomas.

[6] The only other explanation fathomable is a thinly veiled attempt by Respondent to trick this Court. It is no great leap to conclude once this Court declines Certiorari, Respondent would use that Decision to enhance its position in Lombardo.

approve a license to exercise one's freedom of speech and assembly is precisely what the language of the First Amendment was designed to accomplish. In this analysis, Petitioner is aided by counsel's recent reading of Professor Laurence Tribe's Reply to Justice Scalia's analysis of the Supreme Court's Holding in Church of the Holy Trinity v. United States, 143 US 45- (1892)[7]. At Page 92, Professor Tribe describes why the statute in question may be struck as unconstitutional - not for what it says, but for what it does not say:

> If Congress had said, in so many words, "secular lecturers are exempt, but those whose lectures take the form of religious sermons are subject to the ban," would that not have constituted an abridgement of the freedom of speech and of the free exercise of religion - in violation of the First Amendment? Understood as stating a principle against content-based censorship and a mandate of governmental neutrality with respect to religion, the First Amendment would have condemned so discriminatory a federal enactment.

Similarly, if the Oregon Legislature had said, in so many words, "the governing body has the discretion to let languish for as long as it chooses an Application for Permit before determining whether 'the organizer demonstrates compliance or the ability to comply with the health and safety rules governing outdoor mass gatherings'"[8], would that not have constituted an abridgement of the freedom of speech in

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[7]Antonin Scalia, A Matter Of Interpretation, Federal Courts and the Law 92 (Amy Guttman ed. 1997.)

[8] ORS 433.750(1).

violation of the First Amendment? Understood as stating a principle against content-based censorship, the First Amendment would have condemned so discriminatory an enactment. The Act's silence on the requirement for timely review has the same effect on censorship as if those words were written in law.

CONCLUSION

The text of the First Amendment, through the Fourteenth Amendment, prohibits the States from making any law abridging free speech, or the right of the people to peaceably assemble. Oregon's Mass Gathering Act abridges both rights, and must be struck down.

RESPECTFULLY SUBMITTED,

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